CC 1.12/3:1/4

THE PENNSYLVANIA STATE
UNIVERSITY LIBRARIES

Volume 1, No. 4, Pages 549 to 785,
November 10 - November 21, 1986.

KF2765
.1
.A5501

CARLA.

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

THE PENNSYLVANIA
STATE UNIVERSITY
LIBRARIES

FEDERAL COMMUNICATIONS COMMISSION

Mark S. Fowler, Chairman

James H. Quello
Mimi Weyforth Dawson

Dennis R. Patrick
Patricia Diaz Dennis

The contents of this document are subject to correction by means of an erratum appearing at a future date in the **FCC Record.** Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the **FCC Record** should include the volume number, page number, and year. **See** 47 C.F.R. §1.14. Earlier Commission documents may continue to be cited to the **FCC Reports.**

Citation Form: 1 FCC Rcd 1 (1986)

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office
on a subscription basis

TABLE OF CONTENTS

	Page
NPRM, 406 MHz EPIRB's, PR Docket No. 86-424,FCC 86-479	549
R&O, Exempt. of Ultrasonic Medical ISM Devices, FCC 86-493	553
MO&O, Pet.for Declar.Rul'g, Preempt'n of Colo. Reg. FCC 86-494	555
MO&O, Reconsideration of Cox Cable Preemption FCC 86-495	561
A/R Pactel Reno NV Cellular App Dismissal, FCC 86-496	564
Order, Pacific NW Bell Telco, DA 86-163	572
HDO, CP: Comm AM (Cashtown/Shickshinny, PA) MM Doc 86-432 DA 86-165	573
O&A, AT&T, Int'l. Ext. of Lines, DA 86-166	576
O&A, AT&T, Intl. Ext. of Lines, DA 86-167	577
O&A, Argo, Intl. Ext. of Lines, DA 86-168	578
O&A, WUI, Intl. Ext. of Lines, DA 86-169	579
MOO&A, AT&T, Auth. to Const. E.S. & Rerout Cir. to E.S., DA 86-171	580
O&A, Star-Tel, Inc., Intl. Ext. of Lines, DA 86-172	583
O&A, USTA, Intl. Ext. of Lines, DA 86-174	584
ERR,Parts 74 and 78, MM Doc 86-405 DA 86-176	585
HDO CP: Non-comm FM (Abbeville/Lafayette,LA) MM Doc 86-426 DA 86-133	586
ERR; 47 CFR Pt 22; Rur Cell Svc, CC Doc 85-388, DA 86-209	588
Order, John Spring EO App for Review, FCC 86-499	589
MO&O, Seggi B/cing Corp., Assgmt of lic., Erie, Pa., FCC 86-501	592
Agnew-Sachs (Hono, Hawaii) FM CP MM 84-988 FCC 86-506	593
James W. Smith (El Cajon, Ca) Amateur PR 84-774 FCC 86-507	594
HDO, CP: Comm FM (Ft. Mitchell, AL) MM Doc 86-427 DA 86-132	595
Application of PNB to Acquire Gardiner Exchange, DA 86-150	600
Recon, need showing for two-way frequency, PLMS, Zachs, DA86-192	601
O&A, Fairchild, Auth. to Construct, DA 86-194	603
MO&O, Columbia Cellular, PTD T/S (Col. S.C.), DPCRTS, DA86-195	605
MO&O, A.C. Leong, Auth to Const, Cell. (Lafayette, LA), DA86-197	607
ERR, HDO, CP: Comm FM (Ukiah, CA) MM Doc 86-407 DA 86-210	608
HDO, CP: Comm FM (Ukiah, CA) MM Doc 86-407 DA 86-79	609
MTS and WATS Market Structure and Reconsideration of Part 67 FCC 86-503	615
MO&O, ENFIA Rates, CC Docket 78-371, fcc 86-504	618
Indiana Switch Section 214 Authority Reviewed, FCC 86-505	634
500.200, ID, CP: Comm TV (San Antonio, TX.) MM 85-132, FCC 86D-64	637
Ameritech Warehousing Waiver, DA 86-148	662
Order, Den. Extension, WATS-Related, Doc. 86-1, DA 86-182	664
Order, Compliance with § 25.209, DA-86-190 (adopt: 11/6/86)	665
O&A, TRT, Auth. to Construct, DA 86-191	667
MO&O, GTE Mobilnet, DPCRTS, (Santa Cruz, CA), DA86-208	669
MO&O, Western Union, Telex Service, Tr. No. 8601, DA 86-215	670
NPRM, FM B/C STAS. (Centre, AL), DA 86-203	672
NPRM, FM B/C STAS. (Atwater, MN), DA 86-204	674
NPRM, TV B/C STAS. (Peoria, IL), DA 86-205	676
NPRM, FM B/C STAS. (Kaplan, LA), DA 86-206	678
NPRM, FM B/C STAS. (Bogue Chitto, MS), DA 86-207	680
MO&O, Recon. of CC Doc. 85-135, NEX & RCA, FCC 86-497	682
500.2XXX, ID comp. ren. (Galv., Tex.) MM Dkt. 84-647, FCC 86D-65	691
R&0, FM B/C STAS. (Pocatalico, WV), DA 86-183	716
R&O, FM B/C STAS. (Ozark, MO), DA, 86-184	717
R&0, TV B/C STAS. (Twin Falls, ID), DA 86-185	719
PN, Comsat and Contel Appl. for Approval of Merger, DA 86-212	721

MOO&A, ITT&Amsat, Intl. Ext. of Lines-Auth. to Construct, DA 86-216 723
PN, Offshore Telephone Company Seeks Extension DA 86-217 726
ERRATUM, MM Docket No. 86-77, DA 86-219 727
Order, US West, Tariff F.C.C. No. 1, Transmittal. No. 13, DA 86-104 728
In the Matter of BIMS - Notice of Forfeiture, DA 86-151 729
HDO, CP: COMM TV (Klamath Falls, OR) CH-31, MM DOC 86-441 DA86-200 730
HDO CP COM TV (Char'ville, Va. CH-64) MM DOC 86-440 DA 86-201 732
HDO CP Comm TV (Bayamon, P. R. CH. 36 MM DOC 86-439, DA 86-202 735
Order, TEL/MAN v. So. Bell Tel. and Tel Co., DA 86-211 736
MO&O, Lincoln Tel. & Tel., DPCRTS, (Lincoln, NE), DA86-213 737
ERRATUM, Overseas Telecomms. Inc., Intl. Ext. of Lines, DA 86-222 738
Recon., C.J. Communications, Florence, SC, DPCRTS, DA86-228 739
Order Ext. Time to File Reply Comments, PR Dkt 86-174, DA 86-230 740
ERR, MO&O released November 7, 1986, PR 4116-S, DA 86-231 741
MO&O, Tel-Optik, Pro Forma Transfer to Trust, FCC, DA 86-234 742
MO&O, Dama, Auth. to Const., DEMS (Dal. & Hous., TX), DA 86-214 745
To build and operate MMDS station (Denver, CO), DA 86-218 746
Erratum, Telecomms. Systems, Inc., Intl. Ext. of Lines, DA 86-232 750
MO&O, CARS, Auth to Const, DPCRTS (Fort Wayne, IN), DA86-233 751
Recon, Tel-Share, Auth/Const, DPCRTS (Des Moines, IA), FCC86-502 752
ASD ANSWER SERVICE DPLMRS CC 82-587 FCC 86-519 753
1.D., CF and Ren: Non-Comm FM (Dallas, Tx) MM Doc. 85-288 758
SuppDec,Elba Dev Co,KQTV-TV,St Joseph MO,BC 82-763,86R-74 773
NPRM, FM B/C STAS. (Albert Lea, MN), DA 86-223 776
NPRM, FM B/C STAS. (Homigueros, PR), DA 86-224 778
NPRM, FM B/C STAS. (Pago Pago, American Samoa), DA 86-225 780
NPRM, FM B/C STAS. (Morehead City, NC), DA 86-226 782
NPRM, FM B/C STAS. (Defiance, OH), DA 86-227 784

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-424

Amendment of the maritime services rules to allow ships to use 406.025 MHz emergency position indicating radiobeacons for distress alerting and search and rescue functions.	RM-5166

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1986; Released: November 12, 1986

By the Commission:

1. The National Oceanic and Atmospheric Administration of the United States Department of Commerce (NOAA) has filed a petition (RM-5166) requesting that the Commission's rules be amended to permit ships and aircraft to voluntarily use emergency radiobeacons operating on 406.025 MHz.

Background

2. Emergency radiobeacons are used to alert others of a distress situation and to assist search and rescue units to locate those in distress. In the United States, emergency radiobeacons carried on board aircraft are called emergency locator transmitters (ELT's); those carried on board ships are called emergency position indicating radiobeacons (EPIRB's). ELT's and EPIRB's are currently designed for terrestrial, short range transmissions on 121.500 MHz and 243.000 MHz.[1] The United States, Canada, France and the Soviet Union have launched three COSPAS and two SARSAT low polar orbiting satellites which monitor wide areas of the globe for distress signals. Norway, the United Kingdom, Bulgaria, Finland and Denmark have joined this project as "investigators". The COSPAS satellites detect distress signals on 121.500 MHz and 406.025 MHz; the SARSAT satellites on 121.500 MHz, 243.000 MHz and 406.025 MHz. All 121.500 and 243.000 MHz detected signals are re-transmitted in real time on 1544.500 MHz by a transponder installed on each satellite. The 406.025 MHz signals are pre-processed on board the satellites, sent to the ground on 1544.500 MHz and may also be stored on board the satellites and re-transmitted at a later time.

3. The 1544.500 MHz signals transmitted by the satellite transponders are received by special ground stations called Local User Terminals located in pre-designated geographic areas. The Local User Terminals transfer these signals to an associated Mission Control Center, which in turn alerts the Rescue Coordination Center that is responsible for Search and Rescue missions in the region of distress. The vicinity of the radio beacon emitting the distress signal is determined by interpolating the distress signal's Doppler effect, caused by the rapid movement of the satellite through the distress area.

4. The 121.500 MHz and 243.000 MHz carrier frequencies that are currently used by EPIRB's and ELT's are amplitude modulated with an audio swept tone (A3N emission). They provide only distress alert and homing assistance to the distress area. The 406.025 MHz carrier frequency is phase modulated by a digital signal (G1D emission). In addition to the distress alert and homing assistance provisions, the digital signal contains information regarding the type of emergency, the country and identification code of the station in distress, and other information to facilitate search and rescue operations.

5. In the 1983 Mobile World Administrative Radio Conference for the Mobile Services (MOB-83), the 406.0-406.1 MHz band was allocated for the exclusive use of low-power, earth-to-space EPIRB's.[2] Subsequently, the International Radio Consultative Committee (CCIR) recommended certain technical characteristics for Future Global Maritime Distress and Safety System (FGMDSS) EPIRB's that will operate in the 406 MHz band.[3] Additionally, the International Maritime Organization (IMO), the Radio Technical Commission for Maritime Services (RTCM) and the Radio Technical Commission for Aeronautics (RTCA) are currently considering the development of performance standards for satellite EPIRB's and ELT's operating in the 406 MHz band. The Federal Aviation Administration and the Coast Guard are also studying the future use of ELT's and EPIRB's operating on 406.025 MHz on board aircraft and ships.

Discussion

6. In support of its petition NOAA states that the COSPAS/SARSAT system of distress monitoring satellites has completed its development test phase and is prepared to support global monitoring of distress transmissions. Canada, France, the Soviet Union, Norway, Great Britain, Sweden, Denmark and Bulgaria have initiated regulatory action for the use of radiobeacons in the 406 MHz band. The petition was accompanied by COSPAS/SARSAT specifi- cations Document C/S-85/1, revised July 16, 1985, which NOAA suggested we use as a vehicle for the type acceptance of emergency radiobeacons operating on 406.025 MHz. Although no comments were filed in response to the petition, the Coast Guard and the Interagency Committee on Search and Rescue (ICSAR) in letters dated February 24, 1986 and January 22, 1986, respectively, urged the early initiation of rulemaking to permit the voluntary use of 406.025 MHz emergency radiobeacons. The Coast Guard and ICSAR pointed out that the COSPAS/SARSAT system has contributed to the rescue of over 500 individuals using the existing emergency radiobeacons operating on 121.500 MHz. They indicated that potentially greater benefits for search and rescue authorities would be derived from the implementation of the 406.025 MHz emergency radiobeacons.

7. It appears that an amendment of the rules providing for the voluntary use of 406.025 MHz emergency radiobeacons could improve safety by enhancing distress alerting functions and search and rescue operations. NOAA, Coast Guard and ICSAR urge that rulemaking be initiated as soon as possible to permit the benefits of the 406.025 MHz radiobeacon and the COSPAS/SARSAT system to be realized. Accordingly, we propose to amend Part 80[4] of the rules to authorize the voluntary use of 406.025 MHz emergency radiobeacons that comply with CCIR recommended technical specifications on board ships. Operating authority would be under existing ship

station licenses. No application for modification of existing licenses would be required. Since nearly all U.S. aircraft are required by Federal Aviation Regulations to carry ELT's,[5] there appears to be little interest in the aviation community in additionally providing for the voluntary use of 406.025 MHz emergency radiobeacons in aircraft at this time. Therefore, we have not included proposed rules for the carriage of these radiobeacons by aircraft. However, we request comments on whether aircraft should also be authorized to carry 406.025 MHz emergency radiobeacons or whether expansion of the user community should initially be limited to ship operators as proposed. Additionally, we propose to amend footnote 649 to the Table of Frequency Allocations in Part 2 of the rules to conform to the language adopted by the 1983 World Administrative Radio Conference for Mobile Services.

8. We emphasize that the proposed rules will not authorize 406.025 MHz emergency radiobeacons to be used in lieu of the EPIRB's that are required to be carried on board certain types of ships. EPIRB's that are used to satisfy compulsory equipment carriage requirements must meet performance standards in addition to technical specifications.[6] In this proceeding we are only proposing to allow 406.025 MHz emergency radiobeacons that conform to CCIR recommended technical specifications to be used on a voluntary basis. Ships not required to carry EPIRB's could carry 406.025 MHz emergency radiobeacons or compulsory equipped ships could carry these radiobeacons in addition to, but not in lieu of, the mandated EPIRB's.

9. Ultimately, large oceangoing ships which will be subject to the FGMDSS will be required to carry EPIRB's operating on 406.025 MHz. However, these EPIRB's will have to meet performance and environmental standards currently being developed by IMO. Although we concur with the NOAA, Coast Guard and ICSAR view that early implementation of 406.025 MHz emergency radiobeacons could provide improvement in maritime distress alerting and search and rescue operations, we are concerned that voluntary 406.025 MHz radiobeacon operations not result in problems similar to those currently encountered with 121.500 MHz emergency radiobeacons. As ICSAR indicated in its letter of January 22, 1986, there are enormous false alarm and reliability problems with emergency radiobeacon operations on 121.500 MHz.[7] We want to avoid such problems with equipment operating on 406.025 MHz.

10. Therefore, we request comments on whether rules referencing only CCIR technical specifications are sufficient to permit the manufacture and use of voluntary 406.025 MHz emergency radiobeacons. Should we wait for IMO to approve performance standards before adopting final rules which include all or some of these performance standards? Should a single identification scheme be selected for these devices?[8] Should the user community include all ships as proposed or should the user community initially be limited to ships required to carry EPIRB's? Since the Commission has limited resources and ability to assist in locating activated emergency radiobeacons in the marine environment, should we wait until the COSPAS/SARSAT system is fully implemented before adopting final rules in this proceeding? If the voluntary use of the 406.025 MHz emergency radiobeacon in aircraft is supported by the comments, how can the high false activation rate experienced with 121.500 MHz ELT's be avoided?

11. Authority for issuance of this Notice of Proposed Rule Making is contained in Sections 4(i) and 303(g) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and 303(g) and (r). In accordance with the Administrative Procedure Act, 5 U.S.C. 552(a), we propose to incorporate by reference in the rules the CCIR document that contains the applicable technical specifications for the 406.025 MHz emergency radiobeacons. This document is reasonably available to the persons affected through the Commission's headquarters and the International Telecommunication Union. Incorporation by reference will avoid unnecessary duplication in the rules.

12. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules (47 C.F.R. §§1.415 and 1.419) interested parties may file comments on or before February 27, 1987, and reply comments on or before March 30, 1987. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

13. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/ pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation. On the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's rules, 47 CFR §1.1231.

14. We have determined that Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) does not apply to this rulemaking proceeding because if promulgated, it will not have a significant economic impact on a substantial number of small entities. The changes proposed herein will have a minor beneficial effect on the maritime community by permitting the use of 406.025

MHz emergency radiobeacons by ships. These changes are voluntary and will not cause significant economic impact on any entity.

15. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

16. IT IS ORDERED, That a copy of this Notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

17. Regarding questions on matters covered in this proceeding, contact William P. Berges or Robert H. McNamara at (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Proposed Rules

Parts 2 and 80 of Chapter I of Title 47 of the Code of Federal Regulations would be amended as follows:

A. Part 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS: GENERAL RULES AND REGULATIONS.

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. In Section 2.106 footnote "649" is revised to read as follows:

§2.106 Table of Frequency Allocations.

* * * * *

INTERNATIONAL FOOTNOTES

* * * * *

649 The use of the band 406-406.1 MHz by the mobile-satellite service is limited to low power satellite emergency position indicating radiobeacons.

* * * * *

B. Part 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303 unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In Section 80.15 a new paragraph (e)(3) is added to read as follows:

§80.15 Eligibility for station license.

* * * * *

(e) *EPIRB stations.*

(1) * * *

(2) * * *

(3) EPIRB stations operating on 406.025 MHz will be authorized for voluntary use. EPIRB stations operating on 406.025 MHz can not be substituted for other types of EPIRB stations required by the U.S. Coast Guard to be carried on board vessels. No application for modification of a ship station license is required to add an EPIRB station operating on 406.025 MHz.

3. A new Section 80.1061 is added to read as follows:

§80.1061 Special requirements for EPIRB stations operating on 406.025 MHz.

EPIRB stations operating on 406.025 MHz must meet the technical standards contained in the International Radio Consultative Committee (CCIR Recommendation 633 titled "Transmission Characteristics of a Satellite Emergency Position Indicating (Satellite EPIRB) System Operating through a Low Polar Orbiting Satellite System in the 406 MHz Band". This CCIR document is incorporated by reference in accordance with 5 U.S.C. 552(a). The document contains technical standards applicable to EPIRB stations operating on 406.025 MHz. The document is available for inspection at Commission headquarters in Washington, D.C. or may be obtained from the International Telecommunications Union, General Secretariat-Sales Section, Places des Nations, CH-1211 Geneve 20, Switzerland.

C. Part 87 - AVIATION SERVICES

1. The authority citation for Part 87 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

2. In Section 87.35 paragraph (b) is amended by adding the words "a satellite emergency locator transmitter or" after the words "is required to add."

3. In Section 87.183 a new paragraph (ee) is added to read as follows:

* * * * *

(ee) 406.025 MHz: This frequency is available for use by satellite emergency position indicating radiobeacons for transmissions in the earth-to- space direction. Satellite emergency locator transmitter which meet the technical standards of the International Radio Consultative Committee (CCIR) Recommendation titled "Transmission Characteristics of a Satellite Emergency Position Indicating Radio Beacon (Satellite EPIRB) System Operating through a Low Polar Orbiting Satellite System in the 406.025 MHz Band" may be carried on board aircraft without modification of the aircraft station license. These devices can not be substituted for emergency locator transmitters which are required to be carried on board aircraft by Federal Aviation Administration regulations. The CCIR document is incorporated by reference in accordance with 5 U.S.C. 552(a). This document contains technical standards applicable to satellite emergency position indicating radiobeacons operating on 406.025 MHz. This CCIR document is available for inspection at Commission headquarters in Washington, D.C. or may be obtained from the International Telecommunications Union, General Secretariat-Sales Section, Places des Nations, CH-1211 Geneve 20, Switzerland.

FOOTNOTES

[1] The exception is Class "C" EPIRB's which operate on the maritime VHF frequencies 156.750 and 156.800 MHz.

[2] See international Radio Regulation No. 2997A.

[3] See CCIR recommendation 633 titled "Transmission Characteristics of a Satellite Emergency Position Indicating Radio Beacon (Satellite EPIRB) System Operating through a Low Polar Orbiting Satellite System in the 406 MHz Band".

[4] The amendments to the maritime services rules proposed in this proceeding address recently adopted Part 80 (Stations in the Maritime Services). See *Report and Order*, PR Docket No. 85-145, FCC 86-141, released April 25, 1986. Part 80 will be effective on October 2, 1986.

[5] See, 46 CFR 91.52.

[6] Technical specifications refers to the system's electrical and radio wave transmission characteristics. Performance standards include operational and environmental characteristics as well as safety factors.

[7] The 1985 Air Force Resuce Coordination Center Annual Report - Inland Search and Rescue, reported a 97% false activation rate for emergency radiobeacons operating on 121.500 MHz.

[8] It should be noted that the Commission will not maintain a data base associated with an identification scheme established for 406.025 MHz emergency radiobeacons.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 85-303

In the Matter of

Amendment of Part 18 of the FCC Rules to exempt medical ultrasonic diagnostic and monitoring equipment from technical standards.

REPORT AND ORDER

Adopted: October 28, 1986; Released: November 12, 1986

By the Commission:

Introduction

1. By this action, the Commission exempts non-consumer medical ultrasonic[1] diagnostic and monitoring equipment from the technical standards and certain administrative requirements of Part 18 of Title 47 of the Code of Federal Regulations, regarding industrial, scientific, and medical (ISM) equipment. By the terms ISM equipment, the Commission means devices that use energy in the 9 kHz to 3 THz frequency range for non-telecommunication purposes. Part 18 sets forth requirements designed to control electromagnetic interference that can be caused by ISM equipment to authorized telecommunication services.

Background

2. The Commission initiated this proceeding by releasing, on October 17, 1985, a *Notice of Proposed Rule Making* (*Notice*), seeking comments on the possibility of exempting medical ultrasonic equipment from the technical standards of Part 18.[2] Such action was taken in response to a public meeting held with representatives of the industry on August 21, 1984. During that meeting manufacturers of medical ultrasonic equipment requested that their products be exempted from the Part 18 technical standards. The reason given in support of such a request was that the emissions from these medical ultrasonic devices were similar to those of digital medical units that are only subject to a non-interference requirement, under Section 15.801(c)(5) of the Rules. Six comments and three reply comments were filed.[3]

Discussion

3. In the *Notice*, we proposed to exempt medical ultrasonic diagnostic and monitoring equipment from certain administrative and technical regulations of Part 18. This proposal was made after undertaking a study on the interference potential of medical ultrasonic equipment.[4] During this study, we found that the emission levels from the eight samples we tested were, in most cases, below the limits which were applied, at one time, to specialized digital medical units that have since been exempted from the technical requirements established by the Commission. We assumed that the emission levels of such ultrasonic devices would not create harmful interference to the operation of authorized telecommunication services if their use were confined to environments where receivers associated with such services were not likely to be found. We believed that hospitals or clinics could be considered environments in which interference problems caused by ultrasonic devices to authorized telecommunication services would be minimal.

4. Comments received in response to the *Notice* were evenly divided. Support was voiced on the basis that medical ultrasonic monitoring and diagnostic equipment was similar in interference potential to specialized digital medical devices that are exempt from the computing device rules.[5] Some commenters felt that such equipment was usually located in areas such as hospitals or clinics where interference to radio or television reception is unlikely. Others argued that since medical ultrasonic equipment is already subject to considerable regulatory scrutiny from the Food and Drug Administration (FDA) to ensure safe and proper operation, there was no need for Commission involvement. For example, some manufacturers report that due to the FDA requirements, particular with respect to power limitations, their designs are less prone to emit objectionable radiation or conduction levels. Therefore, it was believed by some manufacturers that additional FCC requirements were unduly burdensome or obsolete.

5. Opponents of the exemption argued that no substantial facts had been presented to the Commission to warrant a change in the rules. Some commenters stated that medical ultrasonic devices are frequently used in buildings (hospitals, clinics, etc.) located in residential areas where interference to broadcast and other receivers could occur. Also, parties opposing our proposal reported that the use of medical ultrasonic equipment designed to be operated by consumers was increasing. Finally, some parties argued that our interference study was inconclusive because only a few units were tested.

6. After careful consideration of the comments received, we find that it would be in the public interest to exempt non-consumer medical ultrasonic diagnostic and monitoring equipment from certain administrative and technical standards of Part 18. We note that the records of the Commission's Field Operations Bureau (FOB) show no outstanding cases of interference to authorized telecommunication services from the operation of such medical devices. Further, a recent monitoring of such devices by the Field Operations Bureau (FOB) concluded that medical ultrasonic diagnostic and monitoring equipment in the typical hospital environments presents a minimal interference threat to surrounding communities.[6] We conclude, therefore, that the exemption of medical ultrasonic diagnostic and monitoring equipment from certain administrative and technical requirements of Part 18 will not have any adverse consequences on authorized telecommunication services in the case of non-consumer applications. We believe that this exemption will enhance the benefits derived by society from the application of ultrasonics in the field of medicine by reducing the design (including research and development) and marketing costs of monitoring and diagnostic equipment. Such non-consumer medical ultrasonic devices will continue to be subject to the general provisions of Section 18.105, Sections 18.109 through 18.119, and Section 18.303 of the

Rules, governing inter alia good engineering practices, investigations of interference, prohibited operating frequencies.

7. We remain concerned, however, about the use of these devices in consumer applications. The interference potential to authorized telecommunication services from medical ultrasonic equipment designed or intended for consumer use is greater. Accordingly, consumer medical ultrasonic equipment will not be covered under the exemption.

Final Regulatory Flexibility Analysis

8. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 605, this proceeding will have a beneficial economic impact on small entities because it relieves manufacturers of medical ultrasonic diagnostic and monitoring equipment from having to comply with the technical and administrative requirements of Part 18 of the Rules.

Ordering Clauses

9. Accordingly, IT IS ORDERED, That, under the authority contained in Sections 4(i), 302, and 303 of the Communications Act, Part 18 of the Rules is amended, as shown in the Appendix, effective December 22, 1986 . IT IS FURTHER ORDERED, That this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Part 18 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 18 --INDUSTRIAL, SCIENTIFIC, AND MEDICAL EQUIPMENT

1. The authority citation for Part 18 is amended to read as follows:

AUTHORITY: 47 U.S.C. 4, 301, 302, 303, 304, 307.

2. A new section 18.121 is added to Part 18 to read as follows:

Section 18.121 Exemptions.

Non-consumer ultrasonic ISM equipment, as defined under Section 18.107, that is used for medical diagnostic and monitoring applications is subject only to the provisions of Section 18.105, Sections 18.109 through 18.119, and Section 18.303 of this Part.

*****

FOOTNOTES

[1] Ultrasonics have long been used in the mdeical field for therapeutic purposes. Over the last decade or so, developments in the field of digital electronics and signal processing techniques have led to new types of medical equipment which use ultrasonic energy for a host of diagnostic and patient monitoring purposes. Applications for such equipment include fetal heart monitoring, blood flow measurements, and diagnostic imaging.

[2] 50 fed. Reg. 42967 (October 23, 1985).

[3] Comments were received from the Amador Corp., the Health Industry Manufacturers Association (HIMA), the Hewlett-Packard Co. (HP), the Hewlett-Packard Medical Products Group, the National Association of Broadcasters/Association of Maximum Service Telecasters, and the National Electrical Manufacturers Association (NEMA). Reply comments were filed by HIMA, HP, and NEMA.

[4] See FCC Project Report No. 2226-6.

[5] See Section 15.801(c)(5) of the Rules.

[6] The FOB tests of course measured devices that are examples of current technology. If in the future it becomes apparent that design changes in medical ultrasonic equipment increase the interference potential, it may be necessary to impose some emission limits on these devices.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UNITED CABLE TELEVISION OF COLORADO, INC., CCB-DFD-85-35

AMERICAN TELEVISION AND COMMUNICATIONS CORP.,

JONES TRI-CITY INTERCABLE, INC., and

MILE HI CABLEVISION, INC.

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1986 Released: November 12, 1986

By the Commission: Commissioner Quello concurring in result.

1. The Commission has before it a joint petition for expedited declaratory ruling filed by United Cable Television of Colorado, Inc. (United Cable), American Television and Communications Corporation (ATC), Jones Tri-City Intercable, Inc. (Jones) and Mile Hi Cablevision, Inc. (Mile Hi) (hereinafter jointly referred to as petitioners). The petition seeks a ruling that this Commission has preempted all Colorado state regulation of cable television facilities that are capable of originating or terminating interstate communications. By Public Notice released December 4, 1985, the Commission sought comments on the petition. Sixteen parties submitted comments and seven parties submitted replies. For the reasons stated below, we deny the petition.

I. Background

2. Petitioners operate cable television systems in a number of Colorado franchise areas. In addition to the facilities installed for the provision of traditional cable service, each of the petitioners has installed what is described as an "institutional" cable. Except for a link between two Denver University campuses supplied by Mile Hi and a private security service offered by ATC directly to its subscribers, all the services currently offered by petitioners fall within the definition of "cable service" contained in Section 602(5) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 522(5).[1] Petitioners assert that although only the Mile Hi institutional loop serving Denver University is engaged in interstate communications, each of the petitioners' institutional facilities has the capability to enter the interstate market.

3. The filing of the petition for declaratory ruling was occasioned by a proceeding currently before the Colorado Public Utilities Commission (Colorado PUC) that raises the question of whether the provision of certain services by cable companies renders them public utilities and, therefore, subject to the jurisdiction of the Colorado PUC. The Colorado proceeding was initiated by a citizen's complaint filed against the companies in 1983. In June of 1984 Mountain Bell also filed complaints against petitioners and the cases were consolidated. The first claim for relief requested by Mountain Bell is that the Colorado PUC deregulate the services provided by Mountain Bell that are similar to those the cable companies may offer. Alternatively, it requests that the cable companies be declared "public utilities" and that they be ordered to cease and desist from the offering of services that duplicate services offered by Mountain Bell.

4. Preemption of the Colorado regulation is necessary, according to the companies, because the Colorado statutory scheme includes what is known as the "regulated monopoly doctrine."[2] Petitioners claim that this doctrine "prevents any cable operator from obtaining a certificate of public convenience and necessity if Mountain Bell is already providing a similar service *or* if Mountain Bell simply *proposes* to provide such service."[3] In addition, petitioners assert that the Colorado statutes require that, once certified, a cable operator may not provide service until it has obtained approval of a cost-justified tariff for each service. Because petitioners believe that the Colorado statutory scheme will prevent cable operators from initiating any services that could originate or terminate interstate telecommunications, they request that the Commission expand its ruling in *Cox Cable Communications, Inc.*[4] "to protect those Colorado cable systems that are capable of, but prevented from providing interstate communication services."[5]

5. Petitioners assert that preemption of the Colorado regulatory scheme is necessary in order to further essentially the same policies the Commission found to be burdened by the Nebraska prior certification requirement preempted in *Cox*. Thus, they argue that preemption is necessary in order to promote: 1) competitive interstate services, 2) the development and use of Digital Termination System (DTS) facilities,[6] 3) new cable services and 4) the efficient use of communications facilities.

6. In support of their request petitioners state that the Colorado proceeding already has had an adverse effect upon them. They state that they have expended over $580,000 in legal, engineering and consulting fees and that extensive in-house legal and management time has been expended on the Colorado proceeding. In addition, petitioners argue that the Colorado proceeding has frozen development of cable television non-video services. Affidavits attached to the petition state that the companies have been hesitant to attempt to provide new services in part because of the Colorado PUC proceedings.[7]

II. Comments

7. Comments generally supporting the petition were filed by the National Cable Television Association (NCTA), the California Cable Television Association (CCTA) and the City of Aurora, Colorado. NCTA generally cited the same legal and policy considerations cited by the cable companies in their petition. They assert that the Commission has jurisdiction to issue the requested order through its Title I jurisdiction over "all interstate and foreign communications by wire or radio"[8] and its ancillary jurisdiction pursuant to Titles II and III of the Communications Act, including its authority to regulate cable television. In addition, they argue that the Colorado regulatory scheme ought to be preempted because a prohibition against the provision of intrastate service over the institutional cables would result in a burden on interstate services by preventing the recovery of any fixed costs from intrastate customers. Finally, NCTA asserts that the

inflexibility of the Colorado statutory scheme suppresses innovation, "fails to consider the benefits to consumers of competitive telecommunications offerings,"[9] and could result in fewer choices for users.

8. The California Cable Television Association comments address the regulatory situation in California, which, CCTA asserts, "indicate[s] why, absent the preemption sought in the instant petition, the consumer will be deprived of the benefits of institutional services."[10] It asserts that the experience of Wang Communications in attempting to provide service in California shows that companies may be forced to provide either interstate or intrastate services, but not both.[11] The City of Aurora asserts that the Colorado statutes act as a barrier to its citizens "receiving the best of technological developments contemplated in their cable franchises."[12]

9. Comments opposing the petition were filed by telephone companies,[13] the United States Telephone Association (USTA), the National Association of Regulatory Utility Commissioners (NARUC), the National Telephone Cooperative Association (NTCA), the Alabama Public Service Commission, the People of the State of California and the Public Utility Commission of the State of California (California), the Florida Office of Public Counsel and the National Association of State Utility Consumer Advocates (joint comments) (Florida), and the Colorado Public Utilities Commission (Colorado). Initially, Colorado alleges a basic misunderstanding of Colorado public utility law by the petitioners. Colorado states that the regulated monopoly doctrine provides that before a new provider can be certificated to provide telecommunication services, proof must be made *either* that an existing certificate holder is unwilling or unable to provide the service *or* that its service is substantially inadequate. Citing *Answerphone v. PUC*, 185 Colo. 175, 522 P.2d 1229 (1974), Colorado asserts that it is not necessary to demonstrate both substantial inadequacy of service and unwillingness or inability to provide adequate service: a demonstration of inadequacy of service may be sufficient.[14] In addition, Colorado also claims that petitioners are incorrect in stating that tariffs must be approved. The tariff filing requirement is not burdensome, according to Colorado, because tariffs go into effect automatically on the 30th day after filing unless the PUC previously has taken action to suspend them. Other commenters note that the Colorado PUC may not suspend any tariff for more than seven months. After that time it must either allow the tariff to become effective or reject it.[15]

10. These commenters also argue that preemption is not justified in this case and that petitioners are seeking an unwarranted extension of the *Cox* decision. In this regard, they stress two distinctions between the Colorado situation and the *Cox* case. First, they note that the instant petition seeks preemption of facilities *capable* of providing interstate service. The commenters argue that this request flies in the face of the *Cox* decision because that decision was based upon the immediate effect upon interstate services that the Nebraska prior certification requirement had had and was likely to continue to have. These commenters argue that no immediate effect upon interstate services is possible in this case because most of the petitioners are not providing such service and, in fact, have made no efforts to provide interstate service.[16] Several commenters also argue that the Commission lacks jurisdiction to rule on as broad a class of facilities as those "capable of providing interstate services." Finally, these parties question whether the requested ruling would include cases in which there were no plans for interstate use. According to these commenters, there is no support for such a ruling because there can be no showing that there would be any impact on federal interests.[17]

11. Second, the commenters note that in *Cox* the Commission refused to rule on post-certification regulation, *i.e.* tariff or other economic regulation.[18] While the Commission stated in *Cox* that economic regulation that acted as a barrier to entry might be eligible for preemption, the commenters argue that petitioners have not explained why the tariffing requirement in Colorado is a *de jure* barrier to the provision of interstate service, why interstate and intrastate services cannot be segregated for regulatory purposes, or what activities of the Colorado PUC under the tariffing requirement may frustrate this Commission's policies.[19]

12. The comments opposing the petition also argue that the petitioners have failed to show that they should be deemed non-common carriers. If petitioners are common carriers, the commenters argue, preemption is barred by Section 2(b) of the Communications Act, 47 U.S.C. § 152(b).[20] Common carrier status is indicated, according to Southwestern Bell, for example, because petitioners apparently seek preemption not only with respect to their institutional cable, but also with respect to their cable that currently is being used to provide traditional cable services; petitioners clearly could not have constructed so many miles [approximately 4485] of cable with the intent to offer specialized services to each of thousands of residential customers on an individually negotiated basis.[21] Other commenters note that petitioners have not described the services they may offer and that it is impossible to determine whether the cable companies will be common carriers until they begin offering service.[22]

13. Along these lines, several of the commenters argue that it is premature for the Commission to issue a ruling before the Colorado Commission has taken any action with respect to the complaints before it.[23] Commenters note that Colorado has not ruled on anything other than its jurisdiction to hear the complaints; therefore it is impossible to predict what kind of regulation, if any, will be imposed on the cable companies.[24] Colorado argues that the doctrine of primary jurisdiction requires petitioners to obtain a state law interpretation prior to seeking federal action.[25] Because there has been no Colorado state action, there can be no real harm, according to the commenters.[26] Other parties argue that preemption is premature unless the cable companies actually offer interstate services.[27]

14. Finally, several commenters argue that regulation and, more particularly, deregulation must be applied in an evenhanded manner to all providers of service.[28] Grant of the petition would cause asymmetric regulation and uneconomic bypass according to these parties.[29] Because of the breadth of the requested ruling and its effects upon other providers of service, several commenters argue that this Commission ought to begin a rulemaking proceeding to consider the broad questions raised and, in particular, whether these types of services will generally be offered on a common carrier basis.[30]

15. Petitioners respond that in fact the Colorado regulatory scheme creates more barriers to the provision of service by cable companies than the State of Colorado admits. According to petitioners, Colorado "does not appear to have a full understanding of either its own regulatory framework or the stifling effect it has had upon cable petitioners."[31] Petitioners argue that Colorado has misread

the precedent it cites and that, in fact, in the *Answerphone* case, the certificated carrier had failed to propose a service that matched the service offered by the new provider. In addition, petitioners argue that the potential for suspension of a tariff for seven months and then rejection is a *de facto* barrier to the provision of institutional services.

16. Petitioners also challenge the commenters' assertions that interstate and intrastate facilities and services can be segregated for jurisdictional purposes. They assert that it is impossible to control the use of the facilities and that "it would not be commercially viable for cable [companies] to attempt to offer only interstate services."[32] Although petitioners still request preemption of facilities *capable* of providing interstate services, they state that a declaratory ruling preempting regulation of facilities and intrastate services when the facilities are originating or terminating interstate communications could be sufficient. With respect to petitioners' status as common carriers, they state that there is no intent on the part of the cable companies to provide institutional services on a common carrier basis and that none of the relevant franchises require institutional service capability to all portions of the franchise area.

17. In response to the comments suggesting that it would be inappropriate for the Commission to rule prior to the termination of the Colorado proceeding, petitioners argue that the uncertainty, delay and expense caused by the Colorado proceeding is sufficient to warrant preemption now. Citing *North Carolina Utilities Comm' n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976), petitioners note that judicial precedent allows an agency to preempt an ongoing state regulatory proceeding when the proceeding itself is frustrating federal policies.

18. In addition to the petitioners' reply comments were filed by the NCTA, GTE Telephone Operating Companies, Taconic, USTA, NTCA and California. To a great extent these commenters simply reiterate what had been said in the initial round of comments.[33] The commenters opposing the petition emphasize the fact that Colorado has not ruled on the complaints and that the petition seeks a significant expansion of the Cox case. USTA, for example concludes that the requested ruling "would take the Commission far from any factual base and into a world of undefined services and hypothetical capabilities, with no showing of effect on entry."[34]

III. Discussion

19. State law will be preempted when it conflicts with federal law. Such a conflict arises when Congress has indicated an intent to occupy an entire field of regulation, *see Fidelity Federal Savings & Loan Ass' n v. de la Cuesta*, 458 U.S. 141, 153 (1982), when compliance with both state and federal law is impossible, *see Florida Lime & Avacodo Growers v. Paul*, 373 U.S. 132, 142 (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Federal regulations and policy have no less preemptive effect than federal statutes. *Fidelity Federal Savings and Loan Ass' n v. De La Cuesta*, 458 U.S. 141 (1982).

20. In support of their position that preemption is warranted, petitioners rely primarily on *Cox*, a decision that has subsequently been vacated as moot. *See* (cite). In any event, the circumstances which culminated in our decision in *Cox* are readily distinguished from the facts presented by petitioners here. In *Cox* this Commission preempted a Nebraska prior certification requirement as it applied to the institutional services provided by Cox's subsidiary, Commline. In that case, Commline's institutional facilities were being used for both inter and intrastate communications.[35] The Nebraska Public Service Commission had ordered Commline to cease and desist from providing intrastate service until it obtained a certificate of public convenience and necessity. The petition for declaratory ruling filed by Cox stated that the Nebraska proceeding had had an adverse effect upon the development of its business and sworn testimony was submitted that unless overturned the Nebraska ruling would force Commline to cease doing any business in Omaha, including its interstate business.

21. In the *Cox* decision, we found that this Commission had jurisdiction over the facilities involved because of the interstate traffic that was being carried on the facilities. Based upon the pleadings and sworn testimony, we also found that the Nebraska prior certification requirement had impaired, and was likely to continue to impair, Commline's ability to provide interstate service. We found that this result would be inconsistent with and stand as an obstacle to the accomplishment and execution of our policies encouraging: 1) the development of a competitive interstate communications marketplace, 2) the provision of services other than video services over cable facilities 3) the development of DTS, and 4) efficient use of communications facilities.[36]

22. In the *Cox* proceeding comments had been submitted by several other cable companies relating similar difficulties they were experiencing with state regulation of Commline-type services. Therefore we stated our intention to preempt "[a]ny state regulation of institutional services offered by cable companies that acts as a *de facto* or *de jure* barrier to entry into the interstate communications market or to the provision of interstate services." We also stated that we were unable to determine whether it would be feasible to separate interstate traffic from intrastate traffic for ratemaking purposes or the effect state rate or other economic regulation might have upon interstate communications or federal law or policy. At the same time, we stated that any such regulation that acted as a barrier to the provision of interstate service would be preempted.

23. This Commission continues to be committed to the policies of encouraging interstate competition and efficient use of communications facilities that underlay our decision in *Cox*. However, unlike in *Cox*, it has not been demonstrated that the Colorado regulatory scheme is so hampering interstate communications and the policies related thereto that grant of the instant petition is warranted. Therefore, because this issue is not ripe for consideration, we will deny the requested relief.

24. First, we are not prepared to rule that this Commission has or should preempt all Colorado state regulation[37] of cable television facilities that are *capable* of originating or terminating interstate communications.[38] Presumably this request includes, as some commenters noted, the facilities used for traditional cable television (generally referred to as the "residential cable") and facilities over which no interstate communications may ever travel. In *Cox* the institutional facilities in question were being used to originate and terminate interstate communications. The preemption in that case was based upon the effect the Nebraska proceeding had had and was likely to continue to have on the provision of interstate commu-

nications. In the *Cox* case, there was sworn testimony that absent preemption by this Commission Commline would have to cease doing business in Omaha. Thus, Commline would have been forced to cease its origination and termination of interstate service.

25. In this case, there is no such sworn testimony. Indeed, none of the petitioners is providing any interstate services, except Mile-High, and there is no evidence that the state regulatory scheme is substantially affecting the University link. There are statements to the effect that the Colorado proceedings have influenced the companies' decisions not to provide institutional-type services but even those statements are tempered considerably by admissions that there are technical and economic reasons why cable systems across the country are not providing these types of services.[39] We simply do not see how the fact that these systems may be capable of providing interstate service, in and of itself, provides a basis for preemption. This is not a case in which the cable companies have been providing interstate service and that service is threatened by state regulation or even a case in which the cable companies have been making earnest efforts to provide interstate communications and demonstrably have been thwarted by the state regulations.[40] Thus, no direct effect upon interstate service or facilities has been shown nor, therefore, has there been any showing that the federal policies relating to interstate telecommunications have been thwarted.[41]

26. This case also comes to us in a different procedural stance than the *Cox* case. In this case, the Colorado PUC has taken no action on the complaints. There has been no cease and desist order issued by the Colorado PUC as there was in Cox. While there is some dispute in the pleadings as to the effect of the regulated monopoly doctrine would have on an application for a certificate, petitioners have not been required to file an application, and it is possible that they may never be.[42]

IV. Conclusion

27. Petitioners have not shown that the Colorado proceeding or regulatory structure has had or is so likely to have an adverse impact on interstate communications or federal law or policy related thereto to warrant issuance of the requested declaratory ruling. The alleged effects upon interstate communications and federal law and policy are too speculative and uncertain to warrant preemption. *See NARUC v. FCC*, 727 F. 2d 1212 (D.C. Cir. 1984). Should any Colorado public utility regulation act as a barrier to the provision of interstate services we will consider the issue of preemption at that time.

28. As a final point, quite apart from any formal issue of preemption, we would urge that regulatory authorities at all levels be aware of, and sensitive to, avoiding the detrimental impacts that their regulatory process may have on potentially desirable new telecommunications services. Both the technical ease with which such services might be made possible by cable companies and the potential market have, in our view, been greatly exaggerated.[43] Given a measure of entrepreneurial freedom, however, there are likely to be many data communications services that cable systems can economically and efficiently provide that would be of considerable benefit to consumers. Rather than stultifying governmental processes alternatively prohibiting and requiring such services, a period of experimentation appears to be highly desirable at this point. We urge most strenuously that this be permitted, involving whatever kind of informational oversight may be desired, rather than efforts to retard or promote such services through inherently bureaucratic governmental processes that restrict the ability to innovate.

29. Accordingly, IT IS ORDERED that the Petition for Expedited Declaratory Ruling filed by United Cable Television of Colorado, Inc., American Television and Communications Corp., Jones Tri-City Intercable, Inc., and Mile Hi Cablevision, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] "Cable service" is defined by that Act to be:

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service.

[2] The Colorado statutes provide that any provider of intrastate service must obtain a certificate of public convenience and necessity prior to construction of the facilities or the offering of service. Colo. Rev. Stat. § 40-5-101-102. The statutes further provide that such certificates to provide intrastate intra-LATA service "shall be governed by the doctrine of regulated monopoly." *Id.* § 40-15-104(2). One of the major issues argued in this case is the meaning of the "doctrine of regulated monopoly." *See infra* para. 9.

[3] Petition at 14 (emphasis in original).

[4] 102 FCC 2d 110 (1985) *reconsideration pending* (hereinafter *Cox*).

[5] Petition at 14.

[6] DTS is a fixed point-to-multipoint microwave radio system in the Digital Electronic Message Service (DEMS) consisting of Digital Termination Nodal Stations and their associated User Stations. An affiliate of United Cable currently has applications on file with the Commission for authority to operate DTS facilities in the Denver area. Petitioners state that these facilities "could be used in conjunction with [United Cable's] facilities to expand its potential for the distribution of interstate telecommunications." Petition at 3.

[7] Affidavits have been submitted by executives of each of the cable companies. In addition, affidavits from two consultants, Dale N. Hatfield and Nina W. Cornell, generally conclude that the Colorado proceeding has been a significant factor in the cable companies' decisions as to whether they should provide non-video services. For example, Mr. Hatfield concludes that "the complaints that Mountain Bell has filed against the cable companies in Colorado are significantly dampening the prospects for the development of . . . advanced services." Affidavit of Dale N. Hatfield at 6.

[8] 47 U.S.C. § 151.

[9] NCTA, Comments at 17.

[10] CCTA, Comments at 3.

[11] CCTA asserts that in order to avoid a costly legal battle with Pacific Bell, Wang agreed not to serve interexchange carriers, which, CCTA argues, is the only practical way of providing interstate service.

[12] City of Aurora, Comments at 1.

[13] Comments were filed by Mountain States Telephone and Telegraph Co., Northwestern Bell Telephone Co. and Pacific Northwest Bell Telephone Co. (joint comments) (Mountain Bell); Taconic Telephone Corp., Waitsfield-Fayston Telephone Co., Granite State Telephone, Dobson Telephone Co., and Merrimack County Telephone Co. (joint comments) (Taconic); Pacific Bell; Southwestern Bell Telephone Co. (Southwestern Bell); the Bell Atlantic Telephone Companies (Bell Atlantic); and the Ameritech Operating Companies (Ameritech).

[14] Colorado, Motion to Dismiss at 12. In their comments Mountain States argues that the Colorado regulatory scheme is flexible enough to allow the Colorado PUC to decline to regulate the cable companies at all. Mountain States, Comments at 5.

[15] NTCA Comments at 14; NARUC Comments at 5.

[16] *See, e. g.*, Southwestern Bell at 30; NTCA, Comments at 3. NTCA also notes that the institutional link between the two Denver University campuses is providing interstate service and that there are no allegations in the pleadings that the Colorado PUC proceeding has had any impact on that service. *Id.* at 5-6.

[17] Taconic, Comments at 8; Pacific Bell, Comments at 9; Southwestern Bell, Comments at 30. *See also* NARUC, Comments at 6; California, Comments at 4.

[18] Colorado notes that the petitioners requested preemption of *all* Colorado regulation. Colorado notes that this could be interpreted to include more than utility regulation (*e.g.* health and safety regulation). Most of the commenters focused on the issue of utility regulation, however. *See infra* note 37.

[19] *See, e.g.*, Pacific Bell, Comments at 7; *see also* California, Comments at 5.

[20] *See, e.g., Southwestern Bell, Comments at 9. In addition, Alabama argues that non-video communications services provided by cable companies are "the kind of basic communication services in which the general public has an interest" and which, therefore, should be regulated. Alabama, Comments at 5.*

[21] Southwestern Bell, Comments at 7. Bell Atlantic notes that the Mountain Bell complaint attached to the petition states that pursuant to the city ordinance, under which the cable companies operate, the cable companies are required to make *all* of their services available to *all* of the residents of the city. Bell Atlantic, Comments at 4.

[22] NARUC, Comments at 7.

[23] *See, e. g.*, NTCA, Comments at 8; Florida, Comments at 5-6; Pacific, Comments at 4-6; Colorado, Motion to Dismiss at 6-7; California, Comments at 3. Other commenters argue that we should not rule until the *Cox* appeal is resolved. *See, e. g.*, California, Comments at 6; NARUC, Comments at 3.

[24] Taconic, Comments at 5. Along this line Pacific Bell urges the Commission not automatically to assume that any state regulation is an impediment to its policies and to permit the states a reasonable opportunity to interpret their laws in light of federal policies. Pacific Bell, Comments at 2, 6.

[25] Colorado, Motion to Dismiss at 9.

[26] These comments stress that hearing costs are not sufficient reason for this Commission to take the extraordinary action requested, *see* NTCA at 9-10, and, in any event some of the costs alleged must be attributed to Mountain Bell's request to deregulate its services. Mountain States, Comments at 8. *See also* Pacific Bell, Comments at 4 (characterizing the expenditures as being made in an effort to resist application of the Colorado regulatory scheme, rather than an effort to process an application); Alabama, Comments at 9.

[27] California, Comments at 3.

[28] Mountain States, Comments at 2; Ameritech, Comments at 2,9-12; *see also* Bell Atlantic, Comments at 6 (cable companies ought to be able to compete but only on an equal basis); Florida, Comments at 2-5.

[29] Southwestern Bell, Comments at 16; NTCA, Comments at 21-23; Bell Atlantic, Comments at 3.

[30] Mountain States, Comments at 8; NTCA, Comments at 23. In its comments Alabama requests that prior to the ruling in this case the Commission render a declaratory ruling "on the questions of: (1) whether the Petitioners and similarly situated cable companies will be required to comply with the certification and filing requirements of Title II of the Communications Act and (2) whether the proposed regulatory action by the FCC promotes or allows discrimination, anti-competitive practices or predatory pricing by cable companies under Section 202." Alabama, Comments at 10.

[31] Joint Reply Comments at 9.

[32] Joint Reply Comments at 18.

[33] California, on the other hand, limited its reply to addressing what it termed the "gross mischaracterizations set forth in CCTA's comments concerning the policies of the California Public Utilities Commission." California, Reply Comments at 1. California emphasized that in the Wang case, *see supra* note 11, Wang had not proposed interstate services and that in any event, the California PUC had made it clear that each application to offer intraLATA service would be viewed separately and the restrictions placed on Wang would not necessarily be precedent in any other case.

[34] USTA Reply at 7.

[35] Commline was originating and terminating interstate communications for MCI Telecommunications. Commline ceased doing business in Omaha in December of 1985.

[36] We found that the preemption issue was not affected by Section 2(b) of the Communications Act because Commline was not providing service as a common carrier.

[37] We assume that petitioners only seek preemption of Colorado PUC regulation because that is the regulation to which their petition is addressed. To the extent that their request includes any other regulation, the request is denied as there is no evidence on the record that such regulation affects interstate communications or any federal telecommunications policies.

[38] In their reply comments, the petitioners state that while they are requesting preemption of regulation of facilities that are capable of originating or terminating interstate communications, alternatively they "believe a declaratory ruling preempting those institutional services provided over cable facilities actually originating or terminating interstate communications could be sufficient to allow the petitioners into the interstate market." No evidence is presented in this case, however, that the interstate service provided in Colorado has been adversely affected by the state regulatory scheme.

[39] For example, the affidavit of Dale Hatfield states that a number of factors may hamper the provision of service over institutional cables:

> Often . . . the institutional cable serves only a limited number of locations . . . . [Another] major impediment is the cable systems have been franchised on a community by community basis such that a metropolitan area is seriously fragmented with independently operated cable systems. It is very difficult to offer geographically widespread services in such an environment. Also cable operators are typically entertainment oriented [and] are often preoccupied with establishing the viability of their basic cable interests.

Mr. Hatfield also states that the technical problems associated with residential cables are "reduced" with institutional cables, but the implication is that they are not eliminated. We note that several months after we preempted the Nebraska prior certification requirement, Commline ceased operations.

[40] Not only does the the record show no efforts to provide interstate service but we do not believe the costs of answering the Colorado complaint cited by the cable companies, by themselves, are so great as to justify preemption. The extent to which any of these costs were compelled is not clear and, as noted by the commenters, at least some of those costs must be attributed to responding to Mountain Bell's request that its services be de-regulated.

[41] In addition, we note that no detailed description of possible services, or the method by which they would be provided is given. Thus, it is not possible to determine whether the services would be provided on a common carrier or non-common carrier basis. While it is not unreasonable to assume that these companies will offer service on an individualized basis and that, if and when any new services are offered, the companies will not have sufficient market power to warrant regulating them as common carriers, we do not believe that there is sufficient evidence on this record to make a ruling on the question.

[42] We do not believe we can make judgments as to the correct interpretation of Colorado precedent. However, we should at least give weight to the assertion made by Colorado that the regulated monopoly doctrine "does not, in and of itself, preclude a second provider from being certificated in the event that the existing certificate holder, at the time of filing, is unable or unwilling to provide service or if the service is substantially inadequate." Colorado, Motion to Dismiss at 13.

[43] The Commission's own missteps in this regard are perhaps instructive. Notwithstanding a requirement adopted in 1972 that larger cable systems have the capacity for two-way communications installed (*Cable Television Report* andOrd er, 36 FCC 2d 143 (1972)), little practical use was made of this capacity. The requirement was subsequently eliminated.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COX CABLE COMMUNICATIONS, INC. File No. CCB-DFD-83-1

COMMLINE, INC. and

COX DTS, INC.

Petitions for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1986 Released: November 12, 1986

By the Commission: Commissioner Quello dissenting.

1. The Commission has before it two petitions for reconsideration of its decision in the above-captioned case, *Cox Cable Communications, Inc.*, FCC 85-455 (released September 5, 1985).[1] For the reason indicated below, the issues raised by the Cox petition are now moot. Accordingly, we shall vacate our order in *Cox* and dismiss the petitions for reconsideration as moot.

I. Background

2. On April 22, 1983, Cox Cable Communications, Inc., and its wholly-owned subsidiaries, Cox DTS, Inc. and Commline, Inc., filed a petition for a declaratory ruling that "this Commission has jurisdiction over and has preempted state and local regulation of facilities located wholly within one state and used to originate, distribute or terminate interstate communications including such facilities [that] also distribute intrastate communications." Cox's request arose from a Nebraska Public Service Commission (NPSC) order finding that Cox's subsidiary, Commline of Omaha, Inc. (Commline), is a carrier and ordering Commline to cease and desist from providing certain services in Omaha, Nebraska until it had obtained a certificate of public convenience and necessity from the NPSC. Commline had been providing high-speed digital transmission services over what it termed an "institutional cable" in Omaha.[2] In its petition Cox stated that the NPSC investigation of Commline had had an adverse effect upon Commline's marketing and on the development of its business. An affidavit attached to the petition stated that unless the Nebraska cease and desist order were overturned, Commline would be forced to cease all operations.

3. Cox argued that the Commission should preempt state regulation in order to encourage the rapid development of new and innovative cable services. In support of the petition Cox stated that the institutional cable was subject to FCC jurisdiction because it was being used to originate and terminate interstate traffic for carriers like MCI Telecommunications. It argued that preemption of state regulation was necessary because such regulation would be infeasible and impractical (because inter- and intrastate traffic was being provided on a "nonsegregable, combined basis") and would interfere with interstate services and federal policies promoting competition. Finally, Cox asked the Commission to issue an order stating that, as it then operated, Commline was not a common carrier within the meaning of Section 3(h) of the Communications Act.

4. Many of the cable companies filing comments in support of the Cox petition described difficulties they had had in their attempts to provide services similar to those provided by Commline. They argued that state regulation of their facilities and services would impede technological innovations in cable communications. Commenters opposed to the petition argued, primarily, that the U.S. Court of Appeals for the D.C. Circuit, in *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (NARUC II), already had determined that the FCC may not preempt state regulation of two-way, point-to-point non-video communications. In addition, they argued that there was a lack of factual support for Cox's claim that it was not possible to segregate the inter- and intrastate services for regulatory purposes and that it was neither legal nor fair to grant cable companies the favored position of being free from state regulation while telephone companies offering similar services are regulated.

5. In August, 1985, we adopted an Order that granted the Cox petition in part. First, relying on the test enunciated in *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (NARUC I), we found that Commline did not appear to conduct its business in a manner that would necessitate a finding that it was acting as a common carrier. Commline had claimed that it dealt on an individual basis with each potential customer and that it did not have set prices or terms and conditions for its services. There was no evidence that in fact Commline operated any differently than it had claimed. In addition, we found that there was no compelling reason to regulate Commline as a common carrier because the barriers to entry into the market were not sufficiently high to vest Commline with market power.

6. We also concluded that the Commission should preempt the Nebraska action requiring Commline to apply for a certificate of public convenience because the state action impermissibly infringed on interstate communications and federal policies. We found that the Nebraska action had, and was likely to continue to have, a substantial adverse effect upon the development of Commline's services and business, including interstate access services. Several federal policies were found to be affected by the Nebraska action. First, we found that the state entry regulation inherently affects, and may even foreclose, use of Commline's facilities by long distance providers thereby frustrating our policies designed to facilitate competitive long distance services. Second, we found that state entry regulation of institutional cable systems used with Digital Termination System (DTS) facilities,[3] could impede efficient development of DTS.[4] The third federal policy that the Commission relied upon in preempting the Nebraska state certification requirement was the policy of encouraging the use of cable facilities for services other than traditional cable services.[5] Finally, we noted that spectrum for private microwave systems is now highly congested in some areas and that private cable systems may provide an important alternative to the congested microwave frequencies thus preserving frequencies and ensuring "rapid, efficient, nationwide . . . wire and

radio communication services." Because many of the comments received in response to the Cox petition related problems similar to Commline's (caused by state certification and other regulatory requirements), we stated that "[a]ny state regulation of institutional services offered by cable companies that acts as a *de facto* or *de jure* barrier to entry into the interstate communications market or to the provision of interstate communications must be preempted."

II. The Petitions for Reconsideration

7. The petitions for reconsideration raise procedural and substantive arguments. Procedurally, OPASTCO argues that the Commission erred in ruling on a record that was stale. OPASTCO states that in the two years that elapsed between the filing of most of the comments and the Commission's decision major events had occurred, principally the passage of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), that should have been considered and made subject to public comment.[6] Taconic attacks the issuance of a declaratory ruling in this case. It states that the Commission erroneously restructured federal-state relationships in this proceeding and that a rulemaking proceeding would be the only procedure by which the Commission could obtain an adequate record to rule on the broad policy questions raised. It states that our recognition of the possibility that parties may need to bring specific situations to our attention in the future demonstrates the incompleteness of the record and our ruling. According to Taconic, a rulemaking proceeding would alleviate what it sees as the "administrative nightmare" that will arise from the Order.

8. OPASTCO and Taconic also challenge the finding that Commline was not acting as a common carrier in the provision of service. In finding that there was no compelling reason to regulate Commline as a common carrier we had noted that the Commline service "does not have the characteristics of, and could compete only to a limited extent with, traditional telephone exchange service and switched access service."[7] The petitioners argue that in citing these characteristics of the Commline service we have improperly based our determination of Commline's non-common carrier status on the technology used by Commline in providing service.[8] They point out that the technology is constantly changing and argue that the technology used by a service provider should not, therefore, be determinative of its carrier status. Finally, Taconic argues that it is essential that Commline's offering be treated as common carrier service "to prevent the unjust discrimination in the provision of telecommunication services that Congress sought to avoid" in its consideration of the Cable Communications Policy Act of 1984.

9. Oppositions to the petitions for reconsideration were filed by Cox, the National Cable Television Association, Inc., and United Cable Television (United). Procedurally, United and Cox argue that petitioners lack standing to seek reconsideration. Section 1.106(b) of our Rules provides that a petition for reconsideration may be filed by a party to the proceeding, or any other person adversely affected, if such person can demonstrate "good reason why it was not possible for him to participate in the earlier stages of the proceedings." While Taconic states that it was represented earlier in the filing by the United States Telephone Association (USTA), United argues that it is not sufficient reason for now seeking to participate individually since "no divergence of interests is alleged."

10. The oppositions also argue that it is within the Commission's discretion to proceed either by rulemaking or declaratory ruling and that the Commission has not abused its discretion in this case. With respect to the argument that the Commission erred in finding that Commline was not acting as common carrier, the oppositions state that petitioners have cited no new issues of fact, law or policy that were not before the Commission and that were not addressed in the record upon which the Commission made its decision.

III. Discussion

11. The oppositions to the petitions raise the issue of whether petitioners have standing to seek reconsideration since neither petitioner filed comments in response to the Commission's public notice. While there is a substantial question of whether petitioners have standing,[9] we do not have to make a final determination as to this issue because the petitions have become moot. Commline ceased providing service in Omaha in late 1985.[10] Since there is no need for us to rule on the petitions, we decline to do so.

12. Accordingly, IT IS ORDERED, that the petition for declaratory ruling filed by Cox Cable Communications, Inc. and the petitions for reconsideration filed by OPASTCO and Taconic are DISMISSED as moot and the Commission's decision in this proceeding IS VACATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Petitions were filed by the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO) and Taconic Telephone Co., Waitsfield-Fayston Telephone Co., Granite State Telephone, Dobson Telephone Co., and Merrimack County Telephone Co. (joint comments) (hereinafter referred to as Taconic).

[2] Cox Cable of Omaha, Inc. operates a cable television system in Omaha. Pursuant to its non-exclusive franchise two cables were installed: the first is used primarily to transmit television broadcast and pay television programming; the second (the "institutional cable") was used by Commline to provide its services.

[3] Cox had stated that it intended to utilize its institutional cable systems in conjunction with DTS facilities in the provision of interstate services. At the time the petition was filed, Cox had filed an application for a construction permit for DTS facilities in Omaha. That application has since been withdrawn.

[4] *See* Digital Termination Systems, 86 FCC 2d 360, 389-90 (1981), *aff'd sub nom.* National Ass'n of Regulatory Utility Commissioners v. FCC, 727 F.2d 1212 (D.C. Cir. 1984).

[5] *See, e.g.*, Cable Television Report and Order, 36 FCC 2d 143 (1972).

[6] In addition, OPASTCO argues that we did not adequately consider the bypass implications of granting the Cox request.

[7] Order at para. 28.

[8] OPASTCO Petition at 9; Taconic Petition at 3.

[9] Surprise at the outcome of a case does not constitute sufficient reason for not having participated earlier. *See* Committee for Community Access v. FCC, 737 F.2d 74 (D.C. Cir. 1984). Nor would participating through a trade association necessarily give a person "party" status. *Cf.* Teleprompter Corp. 89 FCC 2d 412 (1982).

[10] Telephone Bypass News at 2 (December, 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PACTEL MOBILE ACCESS

For a construction permit to
establish a cellular system
operating on frequency Block B
in the Domestic Public Cellular
Radio Telecommunications Service
to serve the Reno, Nevada
Metropolitan Statistical Area

ORDER ON REVIEW

Adopted October 30, 1986; Released November 12, 1986

By the Commission:

1. PacTel Mobile Access (PacTel) requests that we review a decision by the Common Carrier Bureau denying PacTel's petition for reconsideration of an action returning, as unacceptable for filing, PacTel's wireline cellular application for the Reno, Nevada MSA.[1] PacTel's application listed an incorrect market number for the Reno, Nevada MSA, and was returned for failure to comply with our filing requirements for cellular applications. In its Application for Review, PacTel presents the question "whether the letter perfect standard was appropriately applied under the unique circumstances of this case or whether, as PacTel maintains, the Bureau's rigid application of that standard herein constitutes arbitrary and unreasonable action contrary to the public interest." Washoe Communications Company (Washoe) filed an opposition. For the reasons set forth below, we deny PacTel's request.

2. We established our 'letter perfect' standard for cellular applications in the *Cellular Lottery Proceeding, First Order on Reconsideration*, 58 Rad. Reg. 2d (P&F) 677, 696 (1985). There, we said "we will require all future cellular applications to be filed in a 'letter perfect' condition, and failure to conform to this standard will constitute grounds for rejection of the application as unacceptable for filing." Procedural requirements were further developed in our *Further Order on Reconsideration*, 59 Rad. Reg. 2d (P&F) 407, 410 (1985). We required that each application contain a certification stating that the application is complete and contains all of the information required by Form 401 and our cellular application rules. We specified that "[t]he signed certification must appear on the first page of each application . . . the cover of which must include the applicant's name, market name and market number for which it is applying. . . . Failure to comply with the foregoing will result in the application being returned as unacceptable for filing." These requirements were intended to speed processing and avoid the year-long delay previously encountered with pre-screening applications. *Further Order on Reconsideration, supra*, paras. 7-8 and n. 16. In our *First Order on Reconsideration, supra*, para. 47, we stated that the necessity to hunt through each application for relevant information was a major factor in this delay. Accordingly, we established the requirement that all identification information must be on the cover of the application. *See* Section 22.913(b) of the Commission's Rules.

3. On the cover of its application, PacTel listed the number of the market for which it was applying as "170". At the same time, it listed the name "Reno, Nevada." The market name properly associated with number 170 is Galveston-Texas City, Texas. The correct market number for Reno is 171. PacTel argues that its error should not have confused the processing staff because they would have had only to turn through its application, noting that the top of each page stated "Reno, Nevada" and that the maps and engineering referred to Reno, not Galveston-Texas City.

4. PacTel further argues that its error originated with the Bureau. PacTel contends that it relied on the May 17, 1984 Public Notice CL-69, which listed Reno as being market number 170. On May 24, 1984, however, the Bureau issued an errata, Public Notice CL-69A, indicating the correct market numbers. PacTel states that it relied on the first list and that the errata "may not have provided adequate notice" of the change.

5. PacTel argues that the fact that its error originated with an official Bureau document should mitigate any sanction applied to it by the Bureau; it argues that it does not deserve the ultimate sanction of dismissal. PacTel argues that its error is of an immaterial nature, and it argues that enforcing our "letter perfect" standard in this case will undermine the goal of the cellular licensing process to include qualified applications in the cellular lottery. It also argues that the purpose of the wireline set-aside, to ensure that the local exchange carrier is afforded the opportunity to participate in the provision of cellular service, will be negated. It argues that the Commission has found that the wireline set-aside and limited eligibility requirements for frequency block B are sufficient to ensure expeditious processing of wireline applications, and that the rules developed to handle the overwhelming number of non-wireline applications should not be strictly applied to wirelines. PacTel notes that only two wireline applicants applied in Reno, and argues that these applications do not constitute an administrative burden which could justify the Bureau's refusal to make an exception to the "letter perfect" standard in its case.

6. PacTel further argues that the Bureau's application of our "letter perfect" standard violates the Administrative Procedure Act, Section 706(2)(A) of Title 5, United States Code, because, PacTel says, the Bureau did not consider the "relevant factors," "whether the action has a rational basis in the facts of record," and the Bureau has not demonstrated a "lateral connection between the facts found and the choice made."[2] PacTel lists the factors which it considers to be relevant: the potential benefits to the public of allowing PacTel to compete for the Reno permit, the negligible contribution to administrative convenience gained by dismissing PacTel's application, whether the wireline set-aside and limited eligibility requirements were enough to ensure expeditious processing of wireline applications, whether rejection based upon an immaterial flaw undermines the purpose of the wireline set-aside, that the revised public notice, CL-69A, may not have provided adequate notice to PacTel and other applicants, and finally, the fact that PacTel's error originated in a Commission document may present mitigating facts.

Discussion

7. PacTel concedes that its failure to inform itself of our procedural rules does not constitute an excuse for non-compliance. Instead, PacTel argues that having issued an erroneous document, which was the "proximate cause" of PacTel's error, the Bureau should make a narrow exception to the letter perfect standard in this case. We cannot accept this theory. To do so would weaken our well-established policy that licensees and applicants are strictly required to comply with all our rules, whether or not they have actual knowledge of them. *Desert Empire Television*, 88 F.C.C.2d 1413, 1417 (1982).

8. Under the circumstances, the public had adequate constructive notice of the correct market numbers. The errata (CL-69A) was issued promptly after the first notice (CL-69). The Federal Register publication of CL-69 contained the *corrected* version of the city and market number list,[3] so that the erroneous market numbering system never appeared in the Federal Register. In addition, both public notices CL-69 and CL-69A were printed in full in Pike & Fischer Radio Regulations.[4] Furthermore, the Pike & Fischer Table of Citations contains a cross-reference to the errata's citation under the citation for the original notice. Given these facts, we are not persuaded by PacTel's argument of detrimental reliance on the original Public Notice.[5]

9. Neither can we agree that the nature of PacTel's error is immaterial. As discussed *supra*, the large number of applications and the pressing need to bring cellular service to the public resulted in the adoption of the certification method of processing. In both the *First Order on Reconsideration*, *supra*, para. 49, and the *Further Order on Reconsideration*, *supra*, para. 7 and n. 16, we emphasized that applications failing to comply precisely with the filing requirements *would be* dismissed. Accordingly, PacTel, and all other applicants, had fair notice of the importance we place on these rules. In order to bring cellular service to the public quickly, there can be no delay associated with having the staff examine or pre-screen each application. Any application that would cause delay by requiring the staff to read through it in order to determine the relevant information was, and is, defective and therefore unacceptable for filing. Having found an irreconcilable market name and market number on the cover of PacTel's application, the staff properly rejected it.[6]

10. PacTel's claim that the Bureau's decision violates the Administrative Procedure Act is duplicative of its earlier arguments. The requirements of the Administrative Procedure Act (APA) were fulfilled when our policy was adopted. *See First Order on Reconsideration*, *supra*, paras. 47-51, and *Further Order on Reconsideration*, *supra*, paras. 4-8. In making its policy decisions, the Commission must consider all the relevant factors, determine whether the action has a rational basis in the facts of record, and determine that there is a lateral connection between the facts found and the choice made. *See* note 2, *supra*. In comparing our findings in the reconsideration decisions with the requirements of the APA, we find that there are two "relevant factors" of primary importance: first, there are a great many cellular applications which meet our basic qualifications standards, and second, there is a need for speed in choosing among them. Our "rational basis" for the letter perfect standard is our considerable experience in processing applications and our judgement on how best to accomplish this in view of our policy goals. Our filing requirements are directly related to, and necessary for us to achieve, our goal of introducing cellular service to the public as expeditiously as possible. This requires applicants to take full responsibility for the accuracy and completeness of their applications, while minimizing the need for our processing staff to spend valuable time in pre-screening applications. As a result, we will be able to move quickly to a lottery, and use staff resources more efficiently by carefully scrutinizing only the tentative selectees.

11. PacTel's argument that we implemented the wireline set-aside to *ensure* that the local exchange carrier is afforded the opportunity to participate in the *provision* of cellular service misreads our decision.[7] We said that "telephone companies will have an opportunity to participate in cellular service." *Cellular Lottery Selection*, 56 Rad. Reg. 2d (P&F) 8, 21 (1984). This is not tantamount to the guarantee of a license. The wireline applicants must meet the same standards as non-wireline applicants, and for the same reasons.

12. Finally, as we noted in the *Further Order on Reconsideration*, *supra*, para. 7 and n. 13, "Congress accorded the Commission broad discretion to establish standards by which applications are preliminarily reviewed for inclusion in the lottery. . . . Conference Report on Communications Amendments Act of 1982, Conference Report No. 97-765, 97th Cong., 2d Sess. 39 (1982)." Accordingly, we will not grant PacTel a waiver of our letter perfect standard nor of our filing requirements.

Ordering Paragraph

13. Wherefore, for the foregoing reasons, IT IS ORDERED that PacTel's application for review is HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] *Order on Reconsideration*, Mimeo No. 4743 (C.C.B., May 27,. 1986). The application was returned by the Mobile Services Division's letter of April 21, 1986.

[2] For the source of this standard, PacTel cites *Biscayne Federal Savings and Loan v. Federal Home Loan Bank Board*, 572 F.Supp. 997, 1005, n. 10 (S.D.Fla. 1983) (citing *Wawszkiewicz v. Department of Treasury*, 670 F.2d 296, 301 (D.C.Cir. 1981).

[3] The time discrepancy between issue date and Federal Register publication enabled the Bureau to enter the correct market list in the Register. 49 Fed. Reg. 22534, May 30, 1984.

[4] *Public Notice - Commission Announces Cellular Markets Beyond* Ninety Largest, 55 Rad. Reg. 2d (P&F) 1565 (1984); Public Notice - Cellular Markets Beyond Ninety Largest: ERRATA, 56 Rad. Reg. 2d (P&F) 785 (1984).

[5] Our decision is supported by the fact that of thousands of applicants, only a few failed to note the corrected market list. The situation here is distinguishable from that in Order on Reconsideration, 103 F.C.C.2d 22 (1986), which was decided under the rules applicable to pre-screening. There, we granted reconsideration due to widespread confusion as to the interpretation of two public notices. Contrast the Order on Reconsideration, 103 F.C.C.2d 414, 417 (1986), where we found that

reconsideration was not justified, in part because only a few applicants had misinterpreted the rule in question. Moreover, at the time these decisions were rendered, we did not utilize the current certification method of processing.

[6] PacTel's attempt to separate itself, as a wireline applicant, from the non-wireline applicants is not reasonable. The Commission received 13,500 applications for cellular service in markets 121 -180 over a two-month period. The same staff that processes the Reno wirelines also processes the other applications. Delay associated with examining any application in depth would affect the processing time of all applications.

[7] We have found that Washoe, the other Reno, Nevada wireline applicant, meets our "presence" requirement for telephone service in the Reno area.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-350

Amendment of Part 73 of the
Commission's Rules Concerning
Equal Employment Opportunity
in the Broadcast Radio and
Television Services

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1986 Released: November 12, 1986

By the Commission:

INTRODUCTION

1. On November 14, 1985, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*) that proposed to amend its rules and procedures regarding equal employment opportunities (EEO) in the broadcast industry.[1] In particular, the Commission proposed two new information collection systems, the Broadcast Station Annual Employment Report (FCC Form 395-B) and the Broadcast EEO Program Report (FCC Form 396), and procedures for evaluating broadcast stations EEO performance based on the information to be provided by these new reports. On June 16, 1986, following the conclusion of the formal comment period in this proceeding, the Office of Management and Budget (OMB) submitted comments regarding the reporting requirements proposed by the Commission and their own alternative proposal for the new Form 396. By this *Further Notice of Proposed Rule Making* (*Further Notice*), the Commission seeks comment on the proposed alternative EEO reporting requirements submitted by the Office of Management and Budget.

BACKGROUND

2. The Commission's current rules set forth several requirements to ensure that licensees of broadcast stations afford equal opportunity in employment.[2] The rules also require the filing of certain information in order that we may determine that broadcasters are complying with the EEO rules. In this respect, broadcasters are required to submit a description of certain aspects of their EEO programs on FCC Form 396-A, the 5-point Model EEO Program report, as part of their application for a license for a new station or their request for assignment of the license of an existing station. In addition, as part of their license renewal application, licensees are required to file FCC Form 396, the 10-point Model EEO Program Report. The Commission also requires broadcast stations to file an Annual Employment Report, FCC Form 395, and to report the status of any EEO complaints.

3. Under the requirements of the Paperwork Reduction Act of 1980, OMB must review all reporting requirements established by federal agencies. On August 26, 1981, OMB disapproved the use of the Commission's EEO program reporting forms and their associated guidelines for program preparation. In view of OMB's action and the fact that the Commission had recently established new EEO requirements for cable television systems, the Commission adopted the *Notice* to consider revisions to its broadcast EEO procedures.[3]

4. In the *Notice*, the Commission stated that in considering revisions to its broadcast EEO reporting and monitoring procedures that it was primarily concerned with a licensee's overall EEO efforts rather than simply the numerical composition of its workforce. Consistent with this approach, the Commission proposed to incorporate into the rules general guidelines concerning EEO policies and practices similar to those that are now contained in the 5-point and 10-point program report forms. It also proposed to eliminate the 5-point program report and to make the 10-point program report significantly less burdensome. The proposed new Broadcast EEO Program Report would consist of four parts: (1) a series of questions requiring "yes" or "no" answers concerning the station's activities under the EEO program requirements; (2) a request for brief descriptions of the duties and responsibilites of employees in certain job categories; (3) a series of questions concerning the licensee's EEO practices requiring written narrative answers; and (4) a section providing labor force data that would be supplied by the Commission but which also would provide an opportunity for the licensee to submit alternative data accompanied by an appropriate explanation.[4] Under this proposal, licensees also could submit any additional information that they believe might be useful to the Commission in evaluating their EEO efforts. The new Form 396 only would be filed in the year of the station's license renewal and only by stations that have six or more employees in that year.

5. Under the Commission's proposal, licensees also would continue to file annual employment reports. However, the Commission proposed several modifications to this reporting requirement. The proposed new Form 395-B would continue to require stations to identify the number of employees by race/national origin and sex in the same nine job categories as the current broadcast annual employment report. However, certain changes would be made to conform the report to the format used by the Equal Employment Opportunity Commission (EEOC) on its Form EEO-1.[5] Under this proposal, full-time and part-time employees would no longer be reported on separate tables and the data would be rearranged to conform with the data table on the EEO-1 form. In addition, the existing procedures would be modified to permit stations with fewer than six full-time employees, rather than five as is currently the case, to complete only the identification and certification portions of the annual form.

DISCUSSION

6. By letter of April 2, 1986, the Office of Management and Budget returned without action the two proposed forms that had been submitted to it for clearance under the Paperwork Reduction Act. The submissions were returned because OMB had not been provided with the requisite time for review (60 days) pursuant to Section 3504(h) of the Paperwork Reduction Act and Section 1320.13 of OMB's paperwork reduction rules (5 CFR §1320.13). Subsequently, OMB submitted informal comments addressing each of the Commission's proposed new information collection forms. In order to assure compli-

ance with the Paperwork Reduction Act and to provide an opportunity for public comment on OMB's specific suggestions, we are issuing this *Further Notice*.

7. OMB states that the proposed Form 395-B is a significant improvement over the existing Form 395 because it is simplified and conforms to the Equal Employment Opportunity Commission's Form EEO-1. OMB also supports the Commission's proposal regarding labor force data on Form 396.

8. However, OMB contends that the proposed Form 396 is not an improvement over the existing form in a number of other respects. In particular, OMB criticizes the required submission of job descriptions and essay answers for several reasons. It believes that these requirements would be especially burdensome on small businesses that do not maintain job descriptions and do not have administrative/legal staffs to write answers to narrative questions. OMB submits that the job descriptions and narrative answers would not be very useful because broadcasters could carefully craft responses to be technically true while not revealing their shortcomings in EEO performance. It further contends that a meaningful evaluation of such loosely structured responses would require more hours from skilled employees than the Commission is likely to devote to routine reviews. Because job descriptions and essay answers cannot be evaluated quickly and easily, OMB believes that the Commission is not likely to devote sufficient resources to routine reviews to make meaningful use of this information. It also comments that the proposed form does not appear to significantly reduce the paperwork burden on broadcasters, and may increase the burden. Finally, in OMB's view, the proposed form does not give broadcasters a clear and simple explanation of the Commission's EEO requirements.

9. For these reasons, OMB proposes an alternative Form 396 styled after the existing 10-point Model Program form. OMB believes that its proposal will remedy the problems that it sees with the form proposed by the Commission in the *Notice*. OMB's proposal for Form 396 is attached in the Appendix. This alternative form would request that respondents indicate whether they follow specific EEO practices in accordance with the rules and would require them to provide some additional information concerning specific activities in furtherance of these responsibilities.[6] This form also incorporates the system for reporting local labor force data from the Commission's own proposal. OMB's proposal would eliminate the questions on job hires and promotions in the Commission's proposal on the basis that this information is reflected in the annual employment report.[7] OMB recommends that the Commission rely on the "Broadcast Station Annual Employment Report" (Form 395-B) for the breakdown of employees by race, ethnicity and sex within job categories. It believes this modification to the EEO evaluation procedure would assist in reducing the emphasis on reporting numbers rather than efforts.

10. OMB's suggested form includes instructions that are clarified and integrated into the form. OMB submits that by designing the form in this manner it is more likely to be completed by managers who actually affect employment practices, and less likely to be referred to lawyers to craft an acceptable response. OMB further states that it has designed the instructions to remind station management of the Commission's EEO requirements and to emphasize that effective affirmative actions in policy dissemination and recruitment are mandatory.

11. The Commission believes it appropriate to allow interested parties to comment on the OMB proposal, and, therefore, we will allow a comment period for that purpose. In submitting comments, parties are requested to consider whether OMB's proposal for Form 396 would provide the Commission with sufficient information to evaluate a broadcast licensee's efforts to comply with the EEO requirements. We are also interested in whether this proposal would minimize the reporting and administrative burden of these requirements for both broadcasters and the Commission. Further, we note that in giving full consideration to OMB's proposal we are not abandoning our initial proposals concerning the Broadcast EEO Program Report at this time. Our publication of this *Further Notice* in the Federal Register, both seeking comment on the OMB proposal and reopening the record with respect to the initial proposal, and the prompt submission of this *Further Notice* to OMB simultaneous to or prior to its publication in the Federal Register should, we believe, constitute full compliance with the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 35) and OMB's implementing regulations (5 CFR 1320). Our final action in this matter will take into consideration the comments filed in response to the *Notice* along with the comments submitted in response to this *Further Notice*.

Regulatory Flexibility Act Initial Analysis

12. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. *Reason for action*. The Commission issued a *Notice of Proposed Rule Making* in response to OMB's review of our broadcast EEO requirements. This action seeks comments on reporting requirements proposed by OMB in its response to the *Notice*.

II. *Objectives*. This proceeding is intended to address the concerns raised by OMB in its disapproval of the use of the Commission's 5-point and 10-point program reports for routine data collection. This proceeding also seeks to reduce the administrative burden of the Commission's broadcast EEO reporting requirements.

III. *Legal basis*. Authority for action as proposed in this rule making proceeding is provided in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

IV. *Description, potential impact and number of small entities affected*. In the *Notice*, the Commission proposed that most broadcast stations would continue to file a modified Annual Employment Report (FCC Form 395). We also proposed to eliminate the 5-point EEO program report that is filed by applicants for construction permits or assignment of license. Finally, the Commission proposed to replace the 10-point EEO program report, filed at the time of license renewal, with a new Broadcast EEO Program Report. In this *Further Notice*, we are requesting comment on a proposal submitted by OMB for an alternative Broadcast EEO Program Report. This proposal would affect approximately 11,000 broadcast stations.

V. *Recording, record keeping and other compliance requirements*. Under the Commission's initial proposals and the modifications suggested by OMB, licensees would continue to file an annual employment report and would file the new Broadcast EEO Program Report with their license renewal application. There would be no change in the recording, record keeping or other compliance requirements.

VI. *Federal rules which overlap, duplicate or conflict with this rule*. None.

VII. *Any significant alternatives minimizing impact on small entities and consistent with the stated* objectives. None.

13. Written comments are requested on the initial regulatory flexibility analysis. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this Furth er Not ic e. but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the Furth er Not ic e, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub.L.No. 96-354, 94 Stat. 1164, 50 U.S.C. §602 et s eq.) (1982).

14. For the purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the time a public notice issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally. Section 1.1231 of the Commission's Rules, 47 CFR §1.1231.

15. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before January 5 . 1987, and reply comments on or before January 20, 1987. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20054. Comments and reply comments will be available for public inspecton during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

16. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens on the public. Implementation of any new or modified requirement or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

17. For further information concerning this proceeding, contact Marcia Glauberman, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION

EQUAL EMPLOYMENT OPPORTUNITY PROGRAM DOCUMENT

Every applicant for renewal of a broadcast station license must prepare an equal employment opportunity program document on this form. The document must be sent to the Federal Communications Commission (FCC), and a copy of the document must be kept in the station's public file. These steps are required to obtain license renewal. Failure to meet these requirements may result in license renewal being delayed or denied. These requirements are contained in Section of the FCC Rules (), and are authorized by the Communications Act of 1934 as amended.

CALL LETTERS:
NAME OF LICENSEE :
CITY AND STATE WHICH STATION IS LICENSED TO SERVE:

SEND NOTICES AND COMMUNICATIONS TO THE FOLLOWING NAMED PERSON AT THE ADDRESS INDICATED BELOW:
NAME
STREET ADDRESS
CITY STATE ZIP CODE
TELEPHONE NO. (* * *)

[ ] If your station employs less than six full-time employees, then check the box at left, complete the certification below, return these top two sheets only to the FCC, and place a copy in your station's public file. You do not have to complete the rest of this form.

If your station employs six or more full-time employees, you must complete all of this form and follow all instructions.

CERTIFICATION

I certify that the statements made herein are true, complete, and correct to the best of my knowledge and belief, and are made in good faith. Signed and dated this
day of , 19
Signature:
Title:

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT. U.S. CODE, TITLE 18, SECTION 1001.

The purposes of this document are to remind you of your station's equal employment opportunity responsibilities, and to provide your station, the FCC and the public with information about whether your station is meeting these responsibilities.

I. GENERAL POLICY

Your station must provide equal emplyment opportunity to all qualified individuals without regard to their race, color, religion, national origin or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

Your station must also encourage applications from qualified minorities and women for hiring and promotion to all types of jobs at your station.

II. RESPONSIBILITY FOR IMPLEMENTATION

Your station must assign a particular official overall responsibility for equal employment opportunity at your station.

Write that official's name and title here.

NAME TITLE

It is also the responsibility of all persons making employment decisions with respect to recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that no person is discriminated against in employment because of race, color, religion, national origin or sex.

III. POLICY DISSEMINATION

Your station must make effective efforts to make management, staff and prospective employees aware that it offers equal employment opportunity. The efforts listed below are generally effective. Make a check next to each practice that your station follows, and list any other efforts.

[ ] The station's employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, State, or Federal agency if they believe they have been the victims of discrimination.

[ ] Appropriate notices are posted informing applicants and employees that the station is an Equal Opportunity Employer and that they have the right to notify an appropriate local, State, or Federal agency if they believe they have been the victims of discrimination.

[ ] We seek the cooperation of the unions represented at the station to help implement our EEO program and all union contracts contain a nondiscrimination clause.

[ ] Other (Specify)

IV. RECRUITMENT

Your station must make special efforts to attract qualified minority and women applicants for all types of jobs at your station. If current efforts are not effective in attracting qualified minority and women applicants, your station must seek more effective approaches.

Make a check next to each practice that your station follows, and list sources and numbers of referrals.

[ ] We attempt to maintain systematic communication with a variety of minority and women's organizations to encourage the referral of qualified minority and female applicants. Examples of such organizations contacted during the past 12 months are:

Organization/Source Number of Referrals

[ ] When we recruit prospective employees from educational institutions such recruitment efforts include area schools and colleges with significant minority and female enrollments. Educational institutions contacted for recruitment purposes during the past 12 months and the number of referrals are:

[ ] When utilizing media for recruitment purposes, help-wanted advertisements always include a notice that we are an Equal Opportunity Employer and contain no indication, either explicit or implied, of a preference for one sex over another.

[ ] When we place employment advertisements in printed media some of such advertisements are placed in media which have significant circulation or are of particular interest to minorities and women. Examples of publications utilized during the past 12 months and the number of referrals are:

[ ] We encourage present employees, particularly minority and female employees, to refer minority and female candidates for existing and future job openings.

V. TRAINING

Training programs are not mandatory. Each applicant is expected to decide, depending upon its own individual situation, whether a training program is feasible and would assist it in its effort to increase the pool of available minority and female applicants. Also, where an applicant already has employee training programs, the information reported in this section should enable it to ascertain whether minority and female employees have the same opportunity to participate as other employees. Training programs must not discriminate on the basis of race, color, religion, national origin or sex. Information submitted with respect to any training programs utilized should include a report covering at least the 12 month period prior to the filing of the application, but may encompass the entire license period, if so desired. Additionally, the applicant may set forth any other assistance to students, schools or colleges which benefits minorities and women interested in entering the broadcasting field. The beneficiary of such assistance should be listed, as well as the form of assistance, such as contributions to scholarships, participation in work/study programs, and the like. Assistance must not discriminate on the basis of race, color, religion, national origin or sex.

[ ] Station resources and/or needs are such that we are unable or do not choose to institute specific programs for upgrading the skills of employees.

[ ] We provide on-the-job training to upgrade the skills of employees. Tangible benefits of such training to minority and women employees during the past 12 nonths may be briefly described as follows:

[ ] We provide assistance to students, schools or colleges in programs that enable minorities and women to compete in the broadcast employment market on an equitable basis:

School or Other Beneficiary Forms of Assistance

[ ] Other (Specify)

VI. AVAILABLE LABOR FORCE

The following table contains FCC-supplied data concerning the percentages of women and minorities among various categories of workers in your station's area. These data are intended to assist in evaluating your station's equal employment opportunity efforts.

If you have other data that more accurately reflect the percentages of women and minorities in the labor force available to your station, then enter those data in the table next to the table of FCC-supplied data, and attach an explanation.

VII. OTHER INFORMATION

You must provide here a brief description of any complaint which has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the station including the persons involved, the date of filing, the court or agency, the file number (if any), and the disposition or current status of the matter.

You may also describe here:

* Any problems the station has experienced in assuring equal employment opportunity, or attacting qualified minority and women candidates for employment or promotion.

* Any efforts the station has undertaken or will undertake to promote equal opportunity in its employment and to encourage applications from minorities and women.

* Any other information regarding equal employment opportunity at the station.

FOOTNOTES

[1] *See Notice of Proposed Rule Making*, MM Docket No. 85-350, 50 FR 49566 (December 3, 1985).

[2] The current broadcast EEO rules are set forth in Section 73.2080 of the Commission's rules, 47 CFR §73.2080.

[3] The Commission revised its cable EEO policies and practices in accordance with the requirements of the Cable Communications Policy Act of 1984 in the *Report and Order* in MM Docket No. 85-61, 50 FR 40836 (October 7, 1985).

[4] *See Notice*, Appendix B.

[5] *See* Notice, Appendix C.

[6] We note that OMB's proposed Form 396 includes a requirement for broadcast station with less than 6 full-time employees to complete the certification section of the form this status, although it exempts them from completing the substantive portions thereof. The Commission's proposal in the Notice would exempt stations with less than 6 full-time employees from any EEO Program Report filing requirement.

[7] While several trends in employment may be discernible from comparisons of the Annual Employment Reports, as OMB contends, we do not believe that these data are sufficient to determine the actual number of promotions and jobs filled during a 12-month period.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Complainant,

v.

AMERICAN SHARECOM, INC.,	E-86-81
AMERICAN TELEPHONE EXCHANGE,	E-86-82
ALLNET,	E-86-83
GTE-SPRINT,	E-86-84
THE WESTERN UNION TELEGRAPH COMPANY,	E-86-85
RCA AMERICAN COMMUNICATIONS, INC.,	E-86-86
GENERAL COMMUNICATIONS, INC.,	E-86-87
CALL U.S., INC.,	E-86-88
LASSMAN-WEBER COMMUNICATIONS,	E-86-89
AMERICAN NETWORK, and	E-86-90

Defendants.

ORDER

Adopted October 30, 1986 ; Released November 12, 1986

By the Common Carrier Bureau:

1. Before us is a request by Pacific Northwest Bell Telephone Company (PNB) to withdraw the above-captioned complaints. *See* letter from G. Michael Crumling, Counsel for PNB, to the Deputy Chief, Enforcement Division (October 22, 1986). PNB filed a complaint for damages against the eleven above-captioned defendants arising from Count II of AT&T Communications, Inc.'s (AT&T-Com) complaint against PNB, File No. E-86-28. On July 18, 1986, the Bureau deferred service of PNB's complaint until AT&T-Com's complaint was resolved. *Pacific Northwest Bell Telephone Co. v. American Sharecom, Inc.*, Mimeo No. 5838 (released July 18, 1986). In September 1986, AT&T-Com informed us that it had settled its complaint against PNB, and we granted its request to withdraw the complaint. *AT & T Communications, Inc. v. Pacific* Northwest Bell Telephone Co., Mimeo No. 7181 (released October 1, 1986).[1] PNB states that, as a result of the settlement of the AT&T-Com complaint, the matters in dispute in PNB's complaint have been resolved as well.

2. The Commission favors resolution of disputes which would otherwise require time-consuming and costly proceedings. Since no matters remain in controversy, we will grant PNB's request to withdraw its complaint.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, that Pacific Northwest Bell Telephone Company's request to withdraw its complaint in File Nos. E-86-81 through E-86-91 IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

[1] In addition to the complaint against PNB, AT&T Communications had filed complaints against a number of telephone companies in which it alleged similar Communications Act violations. *See File Nos. E-86-15 through E-86-48. All the complaints were settled and withdrawn at the same time as the complaint against PNB. AT&T Communications, Inc. v. Mountain States Telephone and Telegraph Co., Mimeo No. 7181 (released October 1, 1986).*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-432

JESUS IS LORD MINISTRIES INTERNATIONAL File No. BP-841102AH
Cashtown, Pennsylvania
Req: 890 kHz, 2.5 kW, D

Paul E. Schumacher & Nancy Schumacher d/b/a LIGHTHOUSE BROADCASTING CO. File No. BP-850729AA
Dalton, Massachusetts
Req: 890 kHz, 0.5 kW, DA-D

Paul E. Schumacher & Nancy Schumacher d/b/a LIGHTHOUSE BROADCASTING CO. File No. BP-850729AC
Falmouth, Virginia
Req: 890 kHz, 2.5 kW (1 kW-CH), DA-D

Jane A. Filler d/b/a SOLVAY RADIO File No. BP-850729AE
Solvay, New York
Req: 890 kHz, 0.5 kW, DA-D

GREATER VIRGINIA BROADCASTER File No. BP-850729AL
Stafford, Virginia
Req: 890 kHz, 1.5 kW, DA-D

UPSTATE BROADCASTERS File No. BP-850729AM
Fayetteville, New York
Req: 890 kHz, 0.25 kW, DA-D

CENTRAL PENNSYLVANIA BROADCASTERS File No. BP-850729AN
Shickshinny, Pennsylvania
Req: 890 kHz, 2.3 kW, D

FAMILY STATIONS, INC. File No. BP-850729AP
Nicholson, Pennsylvania
Req: 890 kHz, 10 kW, DA-D

For Construction Permit

HEARING DESIGNATION ORDER

Adopted: October 30, 1986 Released: November 12, 1986

By the Chief, Audio Services Division

1. The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration the mutually exclusive applications of Jesus Is Lord Ministries International (Jesus Is Lord), Paul E. Schumacher & Nancy Schumacher d/b/a Lighthouse Broadcasting Co. (Lighthouse-Dalton), Paul E. Schumacher & Nancy Schumacher d/b/a Lighthouse Broadcasting Co. (Lighthouse - Falmouth), Jane A. Filler d/b/a Solvay Radio (Solvay), Greater Virginia Broadcasters (Greater Virginia), Upstate Broadcasters (Upstate), Central Pennsylvania Broadcasters (Central), and Family Stations, Inc. (Family) for a new AM broadcast station. These applications are linked to each other either directly or indirectly through the presence of intervening interlocking proposals.[1] Also before us is an informal objection filed against Solvay Radio by Ross C. Pirro, Supervisor, on behalf of the Town of Camillus, New York.[2, 3] 2. *Jesus Is Lord Ministries International*. Although this application was substantially complete when filed, the certification page containing the signature of Jesus Is Lord's president, Reverend Yeager, was that of the Model EEO Program statement, and not the proper certification page for the FCC Form 301. To remedy this deficiency, the applicant must file the proper certification page as an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order. See *Communication Gaithersburg, Inc.*, 60 FCC 2d 537 (1976).

3. Jesus Is Lord also failed to describe the height of the proposed antenna in the local notice statement furnished with its application as required by Section 73.3580(f) of our Rules. This applicant is required to republish the local notice and to file a statement that it has done so with the presiding Administrative Law Judge within 30 days of the release of this Order.

4. The Jesus Is Lord proposal does not include a certification of site availability as required by the Commission's June 26, 1985 Public Notice. Therefore, this applicant must file an appropriate amendment with the presiding Administrative Law Judge within 30 days of the release of this Order or an appropriate issue will be specified by the Judge.

5. Jesus Is Lord has proposed a nominal power of 2.5 kW and restricted efficiency of 281.6 mV/m/kM @ 1 kW with a 246 foot radiator. Based on Docket No. 84-752, effective June 3, 1985, Commission calculations indicate that the nominal power for this proposal should be 2.2 kW and an efficiency of 296.9 mV/m/kW @ 1 kW. A corrective amendment will be required.

6. *Lighthouse Broadcasting Co.* (*Dalton*). This proposal does not include a certification of site availability as required by the Commission's June 26, 1985 Public Notice. Therefore, this applicant must file an appropriate amendment with the presiding Administrative Law Judge within 30 days of the release of this Order or an appropriate issue will be specified by the Judge.

7. We are unable to determine from the map submitted by Lighthouse - Dalton whether the 5 mV/m daytime contour encompasses the community of Dalton as required by Section 73.24(j) of the Commission's Rules. An appropriate issue will be specified.

8. *Lighthouse Broadcasting Co.* (*Falmouth*). We are unable to determine from the map submitted by this applicant whether the 5 mV/m daytime and critical hours contours encompass the community of Falmouth as required by Section 73.24(j) of the Rules. An appropriate issue will be specified.

9. *Solvay Radio*. Rocco C. Pirro, Supervisor, Town of Camillus, New York, filed an informal objection to this application on behalf of the Town questioning the applicant's certification of site availability. In particular Mr. Pirro complains of Solvay's lack of notice to the Town as to its plans to locate its transmitter site there, and states further that the Town has a legitmate zoning ordinance covering use of the land in the community.

10. We do not, as an initial matter, find cause in Mr. Pirro's objection to question Solvay's certification of site availability. This document addresses the applicant's ability to acquire the land in question for its intended purpose. Nor do we find in either the proposal or informal objection any evidence of misrepresentation on Solvay's part. In the absence, finally, of any specific evidence casting doubt on Solvay's ability to comply with relevant zoning ordinances, no basis for further inquiry is present.

11. We are unable to determine whether the proposed 5 mV/m daytime contour will encompass Solvay, New York, the principal community to be served by Solvay Radio, as required by Section 73.24(j) of the Commission's Rules. An appropriate issue will be specified.

12. *Upstate Broadcasters.* Upstate requests a waiver of Section 73.37(b) of the Commission's Rules so as to permit grant of both the Upstate and Central Pennsylvania Broadcasters applications, notwithstanding overlap prohibited by our Rules. Were Fayetteville a community of 25,000 or more, or were it located wholly outside of an urbanized area, Section 73.37(b) would permit the overlap present here. Fayetteville satisfies neither of these conditions, however, and Upstate has set forth no public interest considerations whatsoever justifying waiver. The request is therefore denied.

13. Upstate also failed to file site photos depicting East, Southeast, South and Southwest compass directions as required by Question 8, Section V-A of FCC Form 301. An amendment will be required.

14. Since no determination has been received from the Federal Aviation Administration as to whether the antennas proposed by Lighthouse Broadcasting Co. (Dalton), Solvay Radio, Greater Virginia Broadcasters, Upstate Broadcasters and Family Stations, Inc., would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

15. Except as indicated by the issues specified below, all applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding. As the proposals are for different communities, we will specify an issue to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal or combination of proposals would best provide a fair, efficient, and equitable distribution of radio service. We will also specify a contingent comparative issue, should such an evaluation of the proposals prove warranted.

16. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Paul E. Schumacher & Nancy Schumacher d/b/a Lighthouse Broadcasting Co. (Dalton), Jane A. Filler d/b/a Solvay Radio, Greater Virginia Broadcasters, Upstate Broadcasters, and Family Stations, Inc., whether there is a reasonable possibility that the tower heights and locations proposed would constitute a hazard to air navigation.

2. To determine whether the proposals of Paul E. Schumacher Nancy Schumacher d/b/a Lighthouse Broadcasting Co. (Dalton), Paul E. Schumacher & Nancy Schumacher d/b/a Lighthouse Broadcasting Co. (Falmouth), and Jane A. Filler d/b/a Solvay Radio provide the coverage of the principal community to be served required by Section 73.24(j) of the Commission's Rules, and if not, whether circumstances exist which warrant waiver of that Section.

3. To determine: (a) the areas and populations which would receive primary aural service from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal, or combination of proposals, would best provide a fair, efficient and equitable distribution of radio service.

4. To determine, in the event it is concluded that a choice among the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding.

18. IT IS FURTHER ORDERED, That Jesus Is Lord Ministries International shall file the amendments specified in paragraphs 2, 3, 4, and 5 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That Paul E. Schumacher & Nancy Schumacher d/b/a Lighthouse Broadcasting Co. (Dalton) shall file the amendment specified in paragraph 6 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

20. IT IS FURTHER ORDERED, That the informal objection, filed by Mr. Rocco C. Pirro, Supervisor, Town of Camillus, New York, to the application of Jane A. Filler d/b/a Solvay Radio IS DENIED.

21. IT IS FURTHER ORDERED, That the request for waiver of Section 73.37(b) of the Commission's Rules filed by Upstate Broadcasters IS DENIED.

22. IT IS FURTHER ORDERED, That Upstate Broadcasters shall file the amendment specified in paragraph 13 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

23. IT IS FURTHER ORDERED, That the minor amendments filed by Jesus Is Lord Ministries International, Greater Virginia Broadcasters, Upstate Broadcasters, Central Pennsylvania Broadcasters, and Family Stations, Inc. ARE ACCEPTED in accordance with Section 73.3522(a)(2) of the Commission's Rules.

24. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N. W., Washington, D.C.

25. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the applicants shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 30 days of the mailing of this Order, file with the Commission in triplicate, a

written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

26. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Groups of this nature are commonly termed "daisy chains."

[2] Minor amendments have been filed by Jesus Is Lord Ministries International, Greater Virginia Broadcasters, Upstate Broadcasters, Central Pennsylvania Broadcasters, and Family Stations, Inc. They will be accepted in accordance with Section 73.3522(a)(2) of the Commission's Rules.

[3] Also before us is a letter concerning the Solvay Radio proposal from Leslie F. Lane, Syracuse, New York. The letter contains no substantive allegations and therefore will not be considered as a pleading.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-86-140

Application for authority to acquire and operate circuit multiplication equipment for service to Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

ORDER AND AUTHORIZATION

Adopted: October 31, 1986 Released: November 12, 1986

By the Common Carrier Bureau:

1. The above-captioned application, filed by the American Telephone and Telegraph Company (AT&T) on July 15, 1986, requests authority pursuant to Section 214 of the Communications Act of 1934 to acquire 68 Digital Circuit Multiplication System (DCMS) terminals. The DCMS terminals are to be used in conjunction with AT&T's previously authorized[1] interests in TAT-8 cable circuits for the provision of its authorized services between the U.S. and the countries listed in the Appendix to this order. Public notice of the application was given on July 23, 1986. No comments pertaining to the application were received.

2. AT&T indicates that the DCMS terminals it proposes to acquire are capable of deriving 5 voice paths (equivalent voice circuits) from each TAT-8 minimum assignable unit of ownership (64 kilobit per second (kbps) circuit). The DCMS terminals will be acquired from two suppliers, ECI Telecom (ECI) of Israel and ALCATEL of France. The two suppliers' terminals are not compatible and, therefore, it is necessary that each correspondent pair use terminals provided by the same supplier. AT&T proposes to acquire 14 DCMS terminals from ALCATEL for use with France and 54 DCMS terminals from ECI for use with the other countries listed in the Appendix. The ALCATEL terminals will each cost approximately $87,600 and the ECI terminals will cost approximately $73,400 each. AT&T estimates that the annual maintenance and operating expenses for the DCMS terminals located in the U.S. will be approximately $4,000 per terminal. The captial costs and maintenance and operating expenses for the companion DCMS terminals located in the other countries will be borne by AT&T's correspondents in those countries.

3. AT&T indicates it will use the DCMS terminals in the numbers indicated for providing its authorized services between the U.S. and the countries listed in the Appendix to this Order.[2] AT&T further indicates that, with the exception of the derived capacity for use with Israel, the equivalent voice circuits derived from use of the DCMS terminals will be activated in accordance with the circuit distribution guidelines adopted by the Commission in CC Docket No. 79-184.[3] Activation of derived capacity to Israel will be the subject of appropriate future applications.

4. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

5. Accordingly, IT IS ORDERED pursuant to Section 214 of the Communications Act of 1934 that application File No. I-T-C-86-140 IS GRANTED and AT&T is authorized to:

A. acquire 68 DCMS terminals for use with its previously authorized interests in 64 kbps circuits in the TAT-8 cable system in accordance with all terms and conditions of the Commission's Order authorizing U.S. carrier participation in the construction and operation of that cable system; and

B. use said DCMS terminals, in conjunction with corresponding terminals to be provided by AT&T's correspondents, to provide AT&T's authorized services between the U.S. and the countries listed in the Appendix to this order.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the Commission's Memorandum Opinion, Order and Authorization authorizing U.S. carrier participation in the construction and operation of the TAT-8 cable system, AT&T *et al.*, (File No. I-T-C-84-072) FCC 84-240, (released June 8, 1984).

[2] AT&T states that some of the capacity derived from use of the DCMS terminals may be used in the future to provide its authorized services to countries in addition to those listed in the Appendix to this Order. Such use of the derived capacity will be the subject of appropriate future applications.

[3] *See* Second Report and Order, FCC 85-456, (released August 22, 1985), Erratum, (released October 8, 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-86-176

Application for authority to acquire and operate circuit multiplication equipment for service to India

ORDER AND AUTHORIZATION

Adopted: October 31, 1986 Released: November 12, 1986

By the Common Carrier Bureau

1. The captioned uncontested application, filed on September 11, 1986 by American Telephone and Telegraph Co. (AT&T), requests authority to acquire, install and operate three Digital Trunk Expander Terminals for provision of service to India. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-86-176 IS GRANTED, and AT&T is authorized to:

a. acquire and install three Digital Trunk Expander Terminals; and

b. operate these facilities, in conjunction with matching terminals installed by its correspondent in India, to provide AT&T's regularly authorized services between the U.S. and India and beyond.

3. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ARGO COMMUNICATIONS INTERNATIONAL, INC. File No. I-T-C-86-178

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 31, 1986 Released: November 12, 1986

By the Common Carrier Bureau:

1. The Commission is considering an application, filed on September 18, 1986 and supplemented by letter of October 22, 1986 by Argo Communications International, Inc. (Argo), requesting authority to use existing message telephone facilities to provide international switched voice services between the U.S. and various international points. Argo proposes to use existing facilities of other international carriers to provide the proposed services. The application was placed on public notice on September 24, 1986. No comments were received.

2. Upon review of the application, we find that the applicant has the legal, technical and financial qualifications to provide the proposed services. Argo is authorized by the Commission to provide direct service to the United Kingdom, France and Spain, and points beyond.[1] In recent authorizations, the Commission has recognized that increased competition in international markets is beneficial.[2] We find that the market will support additional carriers and that the added competition will be in the public interest.[3]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Argo.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-86-178 IS GRANTED, and Argo is authorized to provide international switched voice services between the U.S. and points listed in the following tariffs:

Company	Tariff No.
AT&T	1,2
MCI	1
US Sprint	1,2
Allnet	1
SBS	4

5. Copies of any operating agreements entered into between Argo and its correspondents will be filed with the Commission within 30 days of their execution.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball

Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] See File No. I-T-C-83-168, released January 10, 1984.

[2] See cases cited in Teltec Saving Communications Co., Mimeo No. 3548, released April 4, 1986, at n.2.

[3] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), Mackay Radio & Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION INTERNATIONAL, INC. File No. I-T-C-86-179

Application for authority to acquire and operate facilities for direct service to Belize

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 31, 1986 Released: November 12, 1986

By the Common Carrier Bureau:

1. The captioned uncontested application, filed on September 17, 1986 by Western Union International, Inc. (WUI), requests authority to acquire and operate facilities for direct service to Belize. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Belize by WUI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-86-179 IS GRANTED, and WUI is authorized to:

a. lease from Comsat and operate one satellite voice circuit between an appropriate earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Belize furnished by WUI's correspondent in Belize;

b. lease from Comsat International Communications, Inc. and operate one satellite voice circuit in the appropriate east coast earth station;

c. lease and operate one voice circuit between the east coast earth station and WUI's Washington, D.C. earth station;

d. use said facilities to provide WUI's regularly authorized services between the U.S. and Belize and beyond; and

e. subdivide the voice circuits authorized herein in accordance with the Commission's Order and Authorization released October 21, 1983, granting WUI's application File No. I-T-C-82-283 for blanket authority to utilize multiplexing equipment to derive additional channels from authorized voice-grade circuits.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between WUI and its correspondent in Belize, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. The authority granted herein is conditioned on compliance by WUI and its affiliates with Commission policies on uniform settlement rates and exclusive service, facility and traffic arrangements.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY File No. CSG-86-067-P/L

Application for authority to modify an existing earth station in order to construct and operate a transmit/receive earth station for the provision of international services

Application for authority to change the routing of previously authorized international satellite circuits to a proposed new earth station for the provision of services between the United States and various Pacific Ocean Region locations File No. I-T-C-86-166

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: November 4, 1986 Released: November 12, 1986

By the Common Carrier Bureau:

1. The Commission has under consideration the captioned applications filed on August 22, 1986, by the American Telephone and Telegraph Company (AT&T). In Application File No. CSG-86-067-P/L, AT&T requests authority pursuant to Title III of the Communications Act of 1934, 47 U.S.C. 301-399B (1976), and Section 201(c)(7) of the Communications Satellite Act of 1962, 47 U.S.C. 721(c)(7) (1976), to modify an existing domestic satellite earth station in order to construct and operate a transmit/receive earth station at Triunfo Pass, located in Malibu, California, for the provision of international services. In Application File No. I-T-C-86-166, AT&T requests authority, pursuant to Section 214 of the Communications Act of 1934, to change the routing of previously authorized international satellite circuits from the Brewster, Washington international earth station to the earth station it proposes to construct at Triunfo Pass for the provision of communications services between the United States and Pacific Ocean Region (POR) locations. The applications were placed on public notice on September 3, 1986. No comments were received.

2. To construct the Triunfo Pass earth station, AT&T proposes to modify a 32-meter antenna in an existing domestic satellite earth station at the same location to meet INTELSAT Standard A specifications.[1] The proposed international earth station would operate with the INTELSAT POR 180° satellite in the 6/4 gigaHertz bands. Currently, AT&T provides telecommunications services between the United States and various POR points through satellite and terrestrial facilities. The satellite circuits are routed via the INTELSAT 180 ° satellite between the Brewster earth station and earth stations in overseas POR locations. AT&T states that, under its proposal, it would remove all of its circuits from the Brewster earth station and rerout its circuits via the new station at Triunfo Pass by March 31, 1987. AT&T projects that demand for the proposed international earth station at Triunfo Pass would be 1415 circuits during the first year of operation and 1658 circuits during the second year of operation.

3. AT&T's proposed modification of its existing domestic Triunfo Pass station would consist of replacing components in the antenna feed system to change the antenna operation from linear to circular polarization. New low noise amplifiers would be installed and the existing ground communication electronics equipment would be replaced with equipment compatible with the INTELSAT satellite system. AT&T estimates that the conversion of the earth station would cost approximately $2 million for radio equipment and $5 million in other capital costs.

4. According to AT&T, the grant of its proposal would allow it to utilize newer earth station technology, meet its needs for growth and provide its authorized service to the POR on a more cost-effecient basis. AT&T estimates that its proposed rerouting of circuits would result of cost savings of $1.5 million for the station's first year of operation. It expects such cost savings to increase in subsequent years. AT&T also contends that the proposed circuit rerouting would take place without disruption of service to customers.

Discussion

5. In its Report and Order in the *Earth Station Ownership* proceeding, in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concern about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the U.S. as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, when processing IBS and television service applications. The Commission further concluded that, absent special problems, it would treat these applications as routine and expeditiously process them. The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[3]

6. With respect to applications for construction of multipurpose earth stations, the Commission stated that it would continue to closely scrutinize such applications as they raise more conmplex economic, technical and operational issues and may affect the variety, quality and price of services offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would analyze the impact of a grant on the provision of earth station and space segment services. It would conduct this analysis by balancing the possible benefits (*e. g.* shorter terrestrial hauls, increased user options, lower charges to users and increased customer base for INTELSAT services) against the possible detriments (reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.

7. Upon consideration of the applications, we conclude that authorization of the requested services and facilities is in public interest. AT&T's legal, technical and financial qualifications to construct and operate the proposed international earth station are well-established.[4] The proposed earth station complies with INTELSAT performance criteria for Standard A stations. AT&T has also completed the necessary frequency coordination. Further, we find that the proposed, modified Triunfo Pass station would employ up-to-date technology, promising several benefits to consumers of AT&T's overseas service offerings. The use of such technology can be expected to improve the quality of international, POR services provided by AT&T. The improved cost-efficiency of the equipment should result in lower charges to end users and an increased customer base for INTELSAT services. The use of improved technology may also make it possible for AT&T to increase the number of communications services that it provides in the POR.

8. AT&T claims that the use of newer earth station technology will reduce its annual costs by over $1.5 million. This figure reflects AT&T's estimate that, by providing service using the proposed Triunfo Pass station rather than the Brewster facility, it would save approximately $170 per circuit per month. AT&T also states that, as a result of the limited number of access facilities available to Brewster, expansion of capacity at the station to accommodate the anticipated traffic growth in the POR would not be cost effective. AT&T maintains that the radio system used to access the Brewster station has a maximum capacity of 1200 circuits and that the system is now effectively at its full capacity. AT&T's contentions, that the construction of the proposed Triunfo Pass station and rerouting of its Brewster circuits to this proposed station would reduce its per-circuit costs of providing service and enable it more efficiently to accommodate traffic growth in the POR, are not challenged in the record. We would expect these public benefits to ensue from the authorization of the applications considered herein.

9. We further conclude that the transfer of AT&T's existing POR INTELSAT satellite circuits to the proposed multipurpose earth station will not have a significant adverse effect on the owners of the Brewster earth station or on the public.[5] AT&T, which utilizes the vast majority of circuits in the Brewster earth station,[6] has intended for some time to remove its traffic from the Brewster facility. On June 10, 1985, AT&T and Comsat, which collectively owned 97.5 percent of the facility, filed a memorandum of understanding to terminate AT&T's use of the station by year-end 1986.[7] We have been informed that an application by Comsat on behalf of ESOC to close the Brewster facility by March 31, 1987 is imminent. While we cannot at this time make specific findings regarding the effect on the public of closing the Brewster facility, we note that the owners of the facility have not opposed the applications considered herein, which propose removing the vast majority of circuits from the facility. In reviewing the application to close the Brewster station, we will ensure that all users of the facility have access to alternative facilities under reasonable terms.

10. We also find that the construction of the proposed multipurpose earth station will not adversely affect INTELSAT. As AT&T points out, the existing circuits transferred to the proposed earth station will continue to be routed via an INTELSAT Pacific Ocean region satellite. Moreover, as the proposed station is closer to population centers than the Brewster facility, the reduced costs for shorter terrestrial connecting facilities to the station will stimulate traffic, improve connectivity via more INTELSAT satellites and result in a greater retention of traffic by providing more effective competition to alternative transmission systems.

11. Accordingly, IT IS ORDERED, pursuant to Sections 214, 304, 309 and 319 of the Communications Act of 1934, 47 U.S.C. §§214, 304, 309 and 319 (1976), and Section 201(c) of the Communications Satellite Act of 1962, 47 U.S.C. §721(c) (1985), that the applications in File Nos. CSG-86-067-P/L, I-T-C-86-166 ARE GRANTED, and AT&T is authorized to: a. construct and operate the proposed earth station facilities at Triunfo Pass in Malibu, California for the provision of all communications services AT&T is now, or may hereafter be, authorized to provide;[8] b. acquire from Comsat the INTELSAT space segment in Pacific Ocean region satellites for the number of circuits previously authorized for the Brewster, Washington international earth station; c. acquire and operate the necessary channelizing equipment capable of deriving up to the number of circuits previously authorized for the Brewster, Washington international earth station; d. utilize the proposed earth station facilities at Triunfo Pass in Malibu, California to provide AT&T's authorized services to the Pacific Ocean region points listed in the Appendix and to such points served by INTELSAT Pacific Ocean region satellites as AT&T may be authorized in the future to serve.

Before the completion of equipment installation and facility activation, however, AT&T should provide the Commission with a summary of actual installed equipment.

12. The Section 214 authorization granted herein to AT&T is effective on the release date of this order and shall be continued year-to-year unless the Commission notifies the applicant to the contrary and requires that a new appication be filed. Should the Commission require that a new application be filed, the authorization will continue in effect until Commission action on the application.

13. The Commission retains jurisdiction over this matter to insure that all present and future authorized carriers have non-disciminatory use of, and equitable access to, the communications satellite system and earth stations.

14. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between the American Telephone and Telegraph Company and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

15. This order is issued under Section 0.291 of the Commission's Rules and Regulations, 47 C.F.R. §0.291 (1985), and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin

Chief, Common Carrier Bureau

APPENDIX

Pacific Ocean Region Points to which the American Telephone and Telegraph is Authorized to Provide Communications Services

Australia
Fiji
Guam
Hong Kong
India
Indonesia
Japan
Korea
Malaysia
New Zealand
Papua New Guinea
Philippines
Singapore
Sri Lanka
Taiwan
Thailand
American Samoa
China
New Caledonia
Saipan
Tahiti
Tonga
Western Samoa

FOOTNOTES

[1] The existing domestic earth station at Triunfo Pass was acquired by AT&T from GTE Satellite Corporation on January 17, 1986. *See* Application for Consent to Assignment of Radio Station, Construction Permit or License, File Nos. 846-CF-ML-881 and 995-DSE-R-80.

[2] Earth Station Ownership, 100 FCC 250 (1984).

[3] *See* the cases cited in Satellite Gateway Communications, Inc., (File Nos. I-T-C-86-045 *et al.*), Mimeo No. 2896 (released March 4, 1986) and American Telephone and Telegraph Co., (File Nos. CSG-86-013-P/L *et al.*), Mimeo No. 3327 (released March 25, 1986).

[4] American Telephone and Telegraph Co., (File No. CSG-86-062-P/L), Mimeo No. 6841 (released September 11, 1986); American Telephone and Telegraph Co., (File No. CSG-85-055-P/L), Mimeo No. 7135 (released September 19, 1985); American Telephone and Telegraph Co., *et al.*, (File Nos. CSG-86-013-P/L and CSG-86-014-P/L), Mimeo No. 3327 (released March 25, 1986).

[5] The Brewster station is owned by the Earth Station Ownership Committee (ESOC), a group consisting of the Communications Satellite Corporation (Comsat) and various U.S. international carriers.

[6] As of October 8, 1986, AT&T leased 1,023 circuits in the Brewster station. Letter to Commission staff from R.M. Robinson, American Telephone and Telegraph Company (October 16, 1986). We have been orally informed by Comsat staff that, as of October 30, 1986, a total of 1096 circuits were utilized in the facility.

[7] Memorandum of Understanding Relating to the Contiguous U.S. Earth Stations between AT&T and the Communications Satellite Corporation, CC Docket 82-540 (filed June 10, 1985).

[8] AT&T shall request authorization to acquire INTELSAT space segment from Comsat for the provision of new service products or for service to new geographical markets in accordance with the requirements of the Commission's International Competitive Carrier decision, International Carrier Policies, 102 FCC 2d 812 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

STAR-TEL, INC. File No. I-T-C-86-177

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 31, 1986 Released: November 12, 1986

By the Common Carrier Bureau:

1. The Commission is considering an application, filed on September 5, 1986 by Star-Tel, Inc. (STI), requesting authority to use existing message telephone facilities to provide international switched video services between the U.S. and Canada. STI proposes to use existing facilities of other international carriers to provide the proposed services. The application was placed on public notice on September 24, 1986. No comments were received.

2. Upon review of the application, we find that the applicant has the legal, technical and financial qualifications to provide the proposed services. STI, a Texas Corporation, is already providing domestic resale services. It now proposes to compete with other carriers which already provide international switched voice services. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by STI.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-86-177 IS GRANTED, and STI is authorized to provide international switched voice services beween the U.S. and those points listed in the following tariffs:

Company	Tariff No.
AT&T	1
MCI	1
US Sprint	1,2
SBS	4
Allnet	1
Argo	2

5. Copies of any operating agreements entered into between STI and its correspondents will be filed with the Commission within 30 days of their execution.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] See the cases cited in Teltec Saving Communications Co., Mimeo No. 3548 (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UNITED STATES TRANSMISSION SYSTEMS, INC. File No. I-T-C-86-148

Application for authority to acquire and operate facilities between the U.S. and Canada for service to points beyond Canada

ORDER AND AUTHORIZATION

Adopted: November 5, 1986 Released: November 12, 1986

By the Common Carrier Bureau:

1. The captioned uncontested application, filed on July 21, 1986 by United States Transmission Systems, Inc. (USTS), requests authority to lease and operate facilities between the U.S. and Canada for provision of switched voice services between the U.S. and overseas points beyond Canada. USTS has been authorized to provide resale services between the U.S. and overseas points[1] and now proposes to provide service in a more efficient manner. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-86-148 IS GRANTED, and USTS is authorized to: a. lease and operate 24 voice circuits between its office in Buffalo, New York and Montreal, Canada; and b. use said facilities to provide its authorized services between the U.S. and Canada and beyond.[2]

3. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] See United States Transmission Systems, Inc., Mimeo No. 2074, released January 22, 1986 (File No. I-T-C-86-022).

[2] This authorization is limited to the provision of IMTS. Nothing in this order is to be construed as authorizing USTS to provide direct non-IMTS service to international points. USTS must request additional authority to acquire facilities for the provision of new service products or for service to new geographical markets in accordance with the requirements with the Commission's *Competitive Carrier* International decision. International Carrier Policies, 102 FCC 2d 812 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-405

Flexible Operational and Licensing Procedures for the Broadcast Auxiliary Services, Part 74, Subparts D, E, F, and H; and the Cable Television Relay Service, Part 78.

ERRATUM

Released: November 12, 1986

The Notice of Inquiry in the above entitled proceeding, released November 4, 1986 (FCC 86-453) is corrected to show the comment date as May 4, 1987 and the reply comment date as June 18, 1987.

Federal Communications Commission

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM DOCKET NO. 86-426

ABBEVILLE EDUCATIONAL BROADCASTING FOUNDATION
(hereafter "Abbeville")
Abbeville, Louisiana
Req: 91.7 MHz, Channel 219A
3 kw (H&V),
53 meters (HAAT)

File No. BPED-831103AG

TRC EDUCATIONAL BROADCASTING FOUNDATION
(hereafter "TRC")
Lafayette, Louisiana
Req: 91.9 MHz, Channel 220A
.6 kw (H&V),
96 meters (HAAT)

File No. BPED-831219AN

For Construction Permit for
a New Educational FM Station

HEARING DESIGNATION ORDER

Adopted: October 27, 1986 Released: November 13, 1986

By the Chief, Audio Services Division

1. The Commission has under consideration the above-captioned mutually exclusive applications for a new educational FM station. On May 1, 1985, Lake Charles Educational Broadcasting Foundation requested dismissal of its application for a new educational FM station in Lake Charles, Louisiana, file number BPED-831110AP. On October 7, 1985, by way of letter, the Chief, FM Branch dismissed the Lake Charles application. Southwest Educational Media Foundation, Inc., applicant for a new educational FM station in Lake Charles, Louisiana, file number BPED-831216BU, was originally mutually exclusive with the above applications. However, Southwest submitted an amendment to its application on October 2, 1985. As a result of its amended proposal to decrease power and move the proposed tower location, Southwest's application is no longer mutually exclusive with the above- captioned applications.

2. *Abbeville*. Abbeville has indicated that it will be an affiliate of the VOICE Radio Network (VOICE). Because the network affiliation agreement between VOICE and its affiliates includes optional management services, the Commission has directed that all of these affiliates are to file with the Commission changes in any contracts for management services obtained from VOICE for a period of five years from the time a construction permit is granted. Accordingly, an appropriate condition will be specified.

3. *TRC*. TRC has indicated that it will be an affiliate of the American Heritage Radio Network (American Heritage). The network affiliation agreement between American Heritage and its affiliates provides not only programming services, but includes optional management, equipment, and financial services as well. The Commission has been advised by American Heritage that it can no longer meet the terms of its contract with its affiliates. To date, no amendment to the application has been received. Accordingly, TRC will be required to file an amendment with the presiding Administrative Law Judge, within 30 days of the date of this Order, submitting the new source of its programming, management, equipment, and financing. If TRC is unable to comply with this requirement, appropriate issues will be specified by the presiding Administrative Law Judge.

4. TRC has submitted information in response to Section II, question 9, of FCC Form 340 stating that there exists only one trustee in the TRC Foundation. Applicant's Declaration of Trust, page 3, paragraph 5, however, states: "the number of trustees shall be at all times not less than two, and whenever for any reason the number is reduced to one, there shall be, and at any other time there may be, appointed one or more additional trustees." To remedy this inconsistency TRC will be required to provide the presiding Administrative Law Judge with the required information within 30 days of the release of this Order.

5. Applicants have not indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfallon Denver Educational Broadcasting, Inc.* 43 Fed. Reg. 49560 (October 24, 1978). It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement themselves.

6. Since no determination has been received from the Federal Aviation Administration (hereafter "F.A.A.") as to whether the antenna proposed by either applicant would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

7. The respective proposals are for different communities. Consequently, it will be necessary to determine, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

8. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

9. Inasmuch as this proceeding involves competing applicants for noncommercial educational facilities, the areas and populations aspect of the standard comparative issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communciations Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to the applicants, whether there is a reasonable possibility that the tower height and location would constitute a hazard to air navigation.

2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications if any, should be granted.

12. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to Abbeville as a result of this proceeding, that permit shall be conditioned upon the permittee filing with the Commission during the five-year period from the date of grant, copies of all changes in any management constracts with VOICE which it might enter into during this five year period.

13. IT IS FURTHER ORDERED, That TRC file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order demonstrating the sources of its programming, management services, equipment and financing.

14. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, TRC shall submit information to the presiding Administrative Law Judge clarifying the inconsistency regarding the number of trustees in the Foundation.

15. IT IS FURTHER ORDERED, That the F.A.A. IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate a written appearance stating an intention to appear on the date fixed for the hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) as amended, and 47 C.F.R. § 73.3594 give notice of the hearing (either individually or, if feasible and consistent with the Rules, jointly) within the time and in the manner prescribed in such Rules and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-388

Amendment of the Commission's Rules for Rural Cellular Service — RM-5167

ERRATUM

Released November 13, 1986

By the Commission:

The footnotes associated with the Further Notice of Proposed Rule Making (FCC 86-449) in the above-captioned proceeding, released November 7, 1986, were inadvertently omitted. They are included here:

FOOTNOTES

[1] *Cellular Radio Service* (*Lottery Selection*), 58 Rad. Reg. 2d (P&F) 677 (1985), *appeal pending, Maxcell Telecom Plus, Inc.*, No. 85-1322 (D.C. Cir., filed June 3, 1985).

[2] *Cellular Radio Service* (*Lottery Selection*), *supra*, at 685.

[3] *Id.*

[4] We have not found abuses in the partial settlements filed by wireline applicants, and have noted that these partial settlements often result in full market settlements. Therefore, we do not propose to eliminate partial settlements or cumulative chances for wireline applicants.

[5] In Cellular Radio Service (Lottery Selection), supra, at 690-692, the Commission revisited this rule in light of the burden it imposed on widely-held, publicly-traded corporate applicants. The Commission concluded that a change was in the public interest and modified Section 22.921 of the Commission's rules to prohibit ownership of more than five percent interest in a corporation for active corporate investors and more than 10 percent for passive investors and adopted the use of a multiplier to determine attribution in vertical ownership chains. We do not, at this time, propose to change the ownership rules as they affect ownership in publicly-traded companies.

[6] 89 F.C.C.2d 58, 89 (1982), further modified 90 F.C.C.2d 571, 574 (1982), appeal dismissed sub nom. U.S. v. FCC, No. 82-1526 (D.C. Cir. 1983).

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re complaints of

John W. Spring

against

Television Station KNBC,
Los Angeles, California; and
Radio Station KABC
Los Angeles, California

ORDER

Adopted: October 31, 1986 ; Released: November 14, 1986

By the Commission:

1. The Commission has before it applications for review filed by John W. Spring seeking review of the following Mass Media Bureau rulings:[1] (1) the ruling of May 14, 1986, which denied Spring's April 29, 1986, equal opportunities (47 U.S.C. Section 315(a)) complaint against station KNBC(TV) Los Angeles, California; and (2) the ruling of June 2, 1986, which denied Spring's May 8, 1986, complaint against radio station KABC, Los Angeles.

2. After a careful review of the complaints, we believe that the rulings were correct, and that the applications for review do not contain sufficient grounds to warrant reversal or alteration.[2] Therefore, pursuant to Section 1.115(g) of the Commission's Rules, the applications for review of the KNBC(TV) and KABC rulings ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Attachments

John W. Spring
P. O. Box 10038
Santa Ana, California 92711-0038

Dear Mr. Spring:

This letter is in response to your recent complaint which we received on April 29, 1986, as supplemented by your letter dated May 5, 1986. Your complaint concerns the broadcast by television station KNBC, Los Angeles, California, of a program featuring one of your opponents for a seat in the United States Senate. You allege that Mr. Michael Antonovich appeared on the "News Conference" program on KNBC "as its only guest for the sole purpose of being asked about his candidacy and its current status." You further state that the particular program was [u]nlike the regular format for its weekly series, which generally includes a different guest, each week, for the purpose of discussing a recent event that made news in such a manner as to suggest that the person being interviewed was also one of the most qualified individuals to discuss the topic.

Rather, you claim that as the person selected and the topics discussed were "not unique nor related to any outstanding news event, the broadcaster's decision on the format, content and participant(s) should have been based on his/her reasonable, good faith journalistic judgment rather than on an inadvertent or deliberate advantage to a particular candidate." You state that the person selected and the topics discussed on this particular program were not based on their newsworthiness.

You further assert that, in response to your request for equal opportunity under 47 U.S.C. Section 315(a) and 47 C.F.R. Section 73.1940, you were informed by the producer of "News Conference" that the show was "exempt from the equal time requirement due to its designation as a 'regularly scheduled news interview program.' " You state your belief that, even if the program has such a designation, because Mr. Antonovich appeared on "News Conference" solely to discuss his campaign, KNBC must "adhere to the established federal regulations related to broadcasting." You therefore request that the Commission review and evaluate a video tape of the program.

As indicated by your correspondence with KNBC, you are aware that Section 315 of the Communications Act provides that if a broadcaster permits a legally qualified candidate to "use" a broadcasting station, it must afford "equal opportunities" to all other such candidates for that office. However, if a legally qualified candidate appears on a bona fide newscast, bona fide news interview, bona fide news documentary (if the appearance is incidental to the subject of the documentary) or during on-the-spot coverage of a bona fide news event, such an appearance will not be deemed a "use" of a broadcasting station for purposes of Section 315.

When Congress enacted the news exemptions to Section 315 in 1959, it did so to avoid the anticipated inhibiting effect of the Commission's *Lar Daly* decision of the same year. *See Telegram to CBS, Inc.* (*Lar Daly*), 18 FCC 238 (1959); *recon. denied*, 26 FCC 715 (1959). In that case, the Commission had held that a candidate was entitled to equal opportunities in response to an appearance by an opponent on a television newscast. By amending Section 315 to include the four categories of exempt news pro-

gramming. Congress contemplated and intended to encourage increased news coverage of political campaign activity. To further this goal, Congress was prepared to give substantial discretion to the good faith news judgment of broadcast licensees. While Congress did not intend for the exemptions to vitiate the equal opportunities provision, it was clearly willing to risk the possibility of occasional abuses to ensure the greater good which would result from campaign coverage.

Accordingly, while the Commission does have criteria by which it determines whether or not a specific program is a bona fide news interview program, the initial determination is made by the licensee and will be overturned only if it is unreasonable or made in bad faith. Generally, when the individual selected to appear on an interview program is selected by the station on the basis of the individual's newsworthiness, the program is and has been regularly scheduled in the same format for an appreciable period of time, and the context and production of the program remain within the control of the station, the program is considered to be a bona fide news interview, exempt from Section 315 requirements as to appearances by opposing legally qualified candidates. *RKO General, Inc., supra*, at 365-6.

As such, the Commission will not interfere in the licensee's judgment in the absence of "strong evidence" that the licensee was unreasonable in exercising its judgment as to the newsworthiness of the candidate presented, or that it intended to favor the candidacy of one (or more) opponents. *See, e. g., Kennedy for President Committee*, 46 RR 2d 1659 (1980).

You have presented no such evidence. Mr. Antonovich's appearance on the "News Conference" show is not enough, by itself, to indicate an abuse of licensee discretion. Nor does the fact that Mr. Antonovich was questioned about his candidacy in and of itself indicate that the broadcaster intended the show to advance his candidacy. Accordingly, no further action upon your complaint is warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within thirty days of the date of public notice of this letter (*see* Commission Rule 1.4(b) [47 C.F.R. Section 1.4 (b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. *See* Commission Rule 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Mr. John W. Spring
P. O. Box 10038
Santa Ana, California 92711-0038

Dear Mr. Spring:

This letter is in response to your recent request that the Commission investigate the broadcast "debates" between several California Republican candidates for United States Senate. You state that the debates took place on the "Talk Radio" show broadcast on station KABC, Los Angeles, California, moderated by the show's host, Michael Jackson. You indicate that six legally qualified Republican candidates (including yourself) for the seat were excluded from these debates, and that your request for inclusion in those or equivalent debates was denied because "Talk Radio" had "been designated as an exempt [bona fide] news program and that [the Republican candidates had been limited] on the basis of 'findings' from poll(s) research." In support of your contention that all Republican senatorial candidates be given the opportunity to appear on KABC prior to the June 3, 1986 primary, you state that:

the bottom line is that it is unfair to exclude six legally qualified and capable Republican candidates for the Federal Office of United States Senator as the public has a valid interest in the entire list of names which will appear on [the] June 3 primary ballot. As the Fairness Doctrine is related to exempt bona fide news programs, I believe that, in this case, this avenue of opportunity for the currently excluded candidates should be considered first.

With respect to the broadcast of debates between several opposing candidates, broadcasts of debates between political candidates and broadcasts of press conferences held by candidates are generally considered exempt from "equal opportunities" because they were on-the-spot coverage of bona fide news events. *Aspen Institute*, 55 FCC 2d 697 (1975), *affirmed sub nom. Chisolm et al. v. FCC*, 538 F.2d 349 (D.C. Cir. 1976); *cert. denied* 97 S. Ct. 247 (1976). The Commission will not second guess the broadcaster if he chose to cover the debate because of his reasonable, good faith judgment that it was newsworthy, and not for the purpose of giving a political advantage to any candidate.

Broadcaster-sponsored debates are also entitled to the Section 315(a)(4) exemption. *Henry Geller*, 95 FCC 2d 1236 (1983). In reaching that decision, the Commission stated that although there is a chance that freedom and flexibility accorded to broadcasters in their news programming might result in favoritism among candidates, Congress intended to permit that risk in order to foster a more informed electorate. The Commission's view is that the common denominator of all exempt programming is bona fide news value. You have not demonstrated that the licensee's decision to broadcast the debate was inconsistent with the foregoing.

The Fairness Doctrine does apply to exempt programming. However, a *prima facie* fairness complaint to the Commission must contain certain specified information including, *inter alia*, reasonable grounds for believing that the station presented only one side of the election issue in its *overall* programming. You have documented neither your viewing habits nor the amount and type of coverage, if any, your candidacy has received from KABC.

Additionally, we should point out that, under the Fairness Doctrine, it is the responsibility of the broadcaster to determine how best to present contrasting views on a

"controversial issue of public importance." In an election context, the individual candidates represent contrasting viewpoints on the overall issue of who should be elected. Thus each candidate is not a controversial issue himself or herself. Since a broadcaster need present only *significant* contrasting views on any particular issue, he need only make a reasonable, good faith judgment on the significance of a particular candidate and, on this basis, decide how much coverage, *if any*, should be given to his or her candidacy and campaign activities. We will review complaints based on a broadcaster's failure to provide opportunities for the presentation of contrasting views, only to determine whether or not the broadcaster can be said to have acted reasonably, and in good faith. In view of the foregoing, no further action on your complaint is warranted.

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

FOOTNOTES

[1] Copies of the rulings are attached.

[2] The Bureau concluded, and we agree, that Mr. Antonovich's appearance and discussion of his candidacy on the "News Conference" show does not, in and of itself, indicate that the broadcaster intended the show to advance Mr. Antonovich's candidacy. The petitioner advanced no additional arguments pertaining to the content of the programming to support his contention that the program was not a bona fide news interview program. With respect to Spring's contention that the Commission should have reviewed a videotape of the "News Conference" show, we note that Spring did not submit such a tape with his complaint. Moreover, assuming a tape had been made available, in the absence of any evidence of bad faith on the broadcaster's part, there is no appropriate basis or need for the Commission to review program material. It should also be noted in any event that broadcasters are not required to maintain tapes of their programming.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

SEGGI
BROADCASTING CORP. File No. BALH-860429H0
(Assignor)

and
THE JET
BROADCASTING CO., INC.
(Assignee)

For Consent to the Assignment of
License of FM Radio Station WSEG(FM),
Erie, Pennsylvania

THE JET
BROADCASTING CO., INC. File No. BAL-860527FH
(Assignor)

and

GREATER ERIE
ECONOMIC DEVELOPMENT
CORPORATION
(Assignee)

For Consent to the Assignment of
License of AM Radio Station WJET,
Erie, Pennsylania

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1986 Released:November 14, 1986

By the Commission:

1. By *Memorandum Opinion and Order* released on August 21, 1986 (hereinafter referred to as *Order*), the Acting Chief, Mass Media Bureau, pursuant to delegated authority, granted the above-captioned applications. As a result, The Jet Broadcasting Co., Inc. (Jet), licensee of WJET(AM) and WJET-TV, Erie, Pennsylvania, obtained authority to exchange its grandfathered AM facility for WSEG(FM) in Erie, presently licensed to Seggi Broadcasting Corp. (Seggi), contingent upon its assignment of the WJET(AM) license to the Greater Erie Economic Development Corporation.

We now consider motions to stay that action filed by K&K Radio Broadcasting Limited Partnership and Burbach Broadcasting Co. (hereinafter referred to as petitioners), who, as the licensees of radio stations serving Erie, Pennsylvania, filed petitions to deny those applications.[1] Jet filed a consolidated opposition to those motions.

2. It is well established that the Commission will consider the following four factors when acting on a request for a stay of an *Order* pending review: (1) the petitioner must make a showing that it is likely to prevail on the merits of its appeal; (2) failure to grant a stay would lead to the petitioner's irreparable injury; (3) issuance of a stay would not substantially harm other interested parties; and (4) the stay would be in the public interest. *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958), as modified by *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Having examined the motions for stay under this standard, we do not believe that the petitioners have made a sufficient showing to warrant staying the Bureau's action.[2]

3. Although it is claimed that Jet's operation of a radio/television combination will adversely affect the interests of other broadcast licensees in Erie, this kind of general claim falls far short of what is necessary to demonstrate irreparable injury to the petitioners. The petitioners have failed to show that a grant of a stay will not harm other parties to this proceeding or will be in the public interest. In that regard, aside from the contractual obligations of the parties to these transactions, we note that should Seggi be forced into bankruptcy, the prospect of WSEG(FM) going dark will result in a clear disservice, not benefit, to the public in Erie. Having found against the petitioners on three of the elements required for the grant of the stay, there is no need to consider fully the substance of the staff's ruling. That decision will be reserved for the reconsideration and review decision. The applicants have full knowledge that consummation of these transactions is at their risk.

4. Accordingly, IT IS ORDERED, That the motions for stay ARE DENIED.

5. IT IS FURTHER ORDERED, That copies of this Memorandum Opinion and Order shall be sent Certified Mail-Return Receipt Requested to the parties to this proceeding by the Chief, Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Petitions requesting the Bureau to reconsider its action were filed by these petitioners. In addition, another petitioner to deny below, Erie Broadcasting Partners, licensee of WSEE(TV), Erie, Pennsylvania, filed an application for review of the Bureau's action.

[2] Apart from the substance of the Bureau's *Order*, that action did not result in the creation of a new radio/television broadcasting combination in Erie. As there is precedent for the action taken, the Bureau did not exceed the scope of its delegated authority. See Section 0.283 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ROGER AGNEW &
JACQUELINE SACHS
d/b/a **MM DOCKET NO. 84-988**
AGNEW-SACHS
BROADCASTING File No. BPH-830520AI
Honolulu, Hawaii

GEORGE KIMBLE
et al., d/b/a **MM DOCKET NO. 84-989**
MOANA KAI
BROADCASTING
ASSOCIATES File No. BPH-830520AP
Honolulu, Hawaii

For Construction Permit
For a New FM Station

ORDER

Adopted: November 5, 1986; Released :November 14, 1986

By the Commission:

1. Now before us are: (a) an Application for Review of a final Review Board Decision (FCC 86R-27, 103 FCC 2d 899, released May 8, 1986), filed June 9, 1986, and Erratum thereto, filed June 11, 1986, by George Kimble *et al.*, d/b/a Moana Kai Broadcasting Associates (Moana Kai); and (b) a Re-Formed Opposition to Application for Review, filed July 7, 1986, by Roger Agnew and Jacqueline Sachs d/b/a Agnew-Sachs Broadcasting (Agnew-Sachs).[1]

2. IT IS ORDERED, That, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules, the Application for Review, filed June 9, 1986, by Moana Kai Broadcasting Associates IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] On July 30, 1986, the General Counsel, acting pursuant to delegated authority under Setion 0.251(f) of the Commission's Rules, granted Agnew-Sachs' Motion for Leave to File Re-Formed Opposition to Application for Review and accepted Agnew-Sachs' July 7, 1986 Re-Formed Opposition to Application for Review. *Order*, FCC 86I-97, released July 31, 1986.

[2] Moana Kai objects to the Review Board's refusal to stay this adjudicatory proceeding pending resolution of civil letigation to enforce a settlement agreement. We do not believe that stay is necessary at this time. There has been no showing that a stay is warranted under *Virginia Petroleum Jobbers Assn. v. FCC*, 259 F.2d 921, 925 (D.C. Cir. 1958). In any event, if Moana Kai prevails in the aforementioned litigation, our action herein would not preclude us from giving appropritate consideration to a judicial decree. *Radio Station WOW v. Johnsonn*, 326 U.S. 120 (1945); *Cf. Ninety-Two Point Seven Broadcasting, Inc.*, 55 RR 2d 607, 611 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Revocation of License of

JAMES W. SMITH
P. O. Box 2279
El Cajon, California 92021

PR DOCKET NO. 84-774
File No. PR-2943

Licensee of Station W6VCE
in the Amateur Radio Service

Suspension of License of
JAMES W. SMITH
P. O. Box 2279
El Cajon, California 92021

PR DOCKET NO. 84-775

Amateur Advanced Class Operator License

ORDER

Adopted: October 21, 1986; Released: November 14, 1986

By the Commission:

1. We have before us (a) an Application for Review and/or Petition for Reconsideration, Request for Reinstatement Pending Such Review or Reconsideration of a Review Board Decision (FCC 85D-21, 102 FCC 2d 258, released September24, 1985), filed December 19, 1985 by James W. Smith, and (b) an opposition, filed January 2, 1986 by the Private Radio Bureau.

2. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the above-described pleading filed December 19, 1985, by James W. Smith IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM DOCKET NO. 86-427

ROBERT G. PAYNE File No. BPH-841220MB
(hereafter "Payne")
Ft. Mitchell, AL
Req: 98.3 MHz, Channel 252A
1.65 kW (H & V), 121 meters

BOHANAN BROADCASTING, INC. File No. BPH-850506NN
(hereafter "Bohanan")
Ft. Mitchell, AL
Req: 98.3 MHz, Channel 252A
3 kW (H & V), 100 meters

MINORITY RADIO ASSOCIATES File No. BPH-850531MM
(hereafter "Minority")
Ft. Mitchell, AL
Req: 98.3 MHz, Channel 252A
3 kW (H & V), 100 meters

ROSIE R. STRONG & KATHRYN G. CASON File No. BPH-850531MS
(hereafter "Strong & Cason")
Ft. Mitchell, AL
Req: 98.3 MHz, Channel 252A
3 kW (H & V), 100 meters

JANICE CAMBA File No. BPH-850531ND
(hereafter "Camba")
Ft. Mitchell, AL
Req: 98.3 MHz Channel 252A
3 kW (H & V), 100 meters

For Construction Permit
for a New FM Station

HEARING DESIGNATION ORDER

Adopted: October 27, 1986 Released: November 13, 1986

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In the interest of administrative efficiency and resource economy, portions of this Order have been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

OPINION PARAGRAPHS

Local Notice

Applicable	Inapplicable
[ ]	[X]

3. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give notice of the filing of their applications. We have no indication that the applicant(s) below published the required notice. To remedy this deficiency, the applicant(s) must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.
APPLICANT(S):

Applicable	Inapplicable
[ ]	[X]

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. The applicant(s) below has published the required notice, but the notice is deficient. To remedy this deficiency, the applicant(s) must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.
APPLICANT(S) DEFICIENCY

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

5. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below proposes to locate its main studio outside that community and gives the following justification(s):
APPLICANT(S) LOCATION(S) JUSTIFICATION(S)

(a) good cause has been shown by the following applicant(s) for the proposed main studio location:
(b) good cause has not been shown by the following applicant(s) and, accordingly, an issue will be specified.

Applicable	Inapplicable
[ ]	[X]

6. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below states in its response to Item 12, Section V-B, Form 301, that its main studio will be at a location to be determined, with no indication that the determination would be limited to sites within the city of license. Under these circumstances, the applicant(s) will be required to

file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the city of license, or an appropriate issue will be specified by the Judge.
APPLICANT(S):

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

7. The engineering data submitted by the applicant(s) below does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission Rules:
APPLICANT(S) WAIVER JUSTIFICATION(S)

(a) The following applicant(s) has submitted facts and circumstances which persuade us that grant of a waiver of Section 73.315(a) would be in the public interest:
(b) The following applicant(s) has not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an issue will be specified:
(c) The following applicant(s) has not requested a waiver of 73.315(a) and, accordingly, an issue will be specified:

Financial Qualifications

Applicable	Inapplicable
[X]	[ ]

8. The material submitted by the applicant(s) below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

APPLICANT(S)	DEFICIENCY
Camba	Applicant states she has not obtained the necessary documentation to demonstrate her financial qualifications.

Applicable	Inapplicable
[ ]	[X]

9. The applicant(s) below has certified as to its financial qualifications. The certification, however, does not substantially meet the certification set out in revised Section III, Form 301. Accordingly, the applicant(s) will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.
APPLICANT(S):

Programming Statement

Applicable	Inapplicable
[ ]	[X]

10. The applicant(s) below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Paragraph 1, Section IV, Form 301. Accordingly, the applicant(s) will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.
APPLICANT(S):

E.E.O.

Applicable	Inapplicable
[ ]	[X]

11. The material submitted by the applicant(s) below fails to indicate that it will have less than five full-time employees. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Accordingly, the applicant(s) will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.
APPLICANT(S):

Late Filed Amendments

Applicable	Inapplicable
[ ]	[X]

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was(were) filed after the "B" cutoff date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.
APPLICANT(S) DATE AMENDMENT(S) FILED

Areas & Populations

Applicable	Inapplicable
[X]	[ ]

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard

comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

14. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

Different Communities 307(b)

Applicable	Inapplicable
[ ]	[X]

15. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

Air Hazard

Applicable	Inapplicable
[X]	[ ]

16. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant(s) below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT(S):

Payne, Minority, Strong & Cason, Camba

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

ISSUES

Main Studio

Applicable	Inapplicable
[ ]	[X]

To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the community of license by the following applicant(s):

City Coverage

Applicable	Inapplicable
[ ]	[X]

To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section:

Financial Qualifications

Applicable	Inapplicable
[X]	[ ]

1. To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified:

Camba

Air Hazard

Applicable	Inapplicable
[X]	[ ]

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation:

Payne, Minority, Strong & Cason, Camba

307(b)

Applicable	Inapplicable
[ ]	[X]

To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

Comparative

Applicable	Inapplicable
[X]	[ ]

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

Ultimate

Applicable	Inapplicable
[X]	[ ]

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

ORDERING CLAUSES

Legal Notice

Applicable	Inapplicable
[ ]	[X]

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published:

Applicable	Inapplicable
[ ]	[X]

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished:

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

21. IT IS FURTHER ORDERED, That the following applicant(s) shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 301, and, if appropriate, a showing of good cause if its respective main studio will be located outside the city of license:

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

22. IT IS FURTHER ORDERED, That, as to the following applicant(s), the provisions of Section 73.315(a) ARE WAIVED to permit a signal level of less than 3.16 mV/m over the entire city of license:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit the financial certification required by Section III, Form 301, or advise the presiding Administrative Law Judge that the required certification cannot be made:

Programming Statement

Applicable	Inapplicable
[ ]	[X]

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area:

E.E.O.

Applicable	Inapplicable
[ ]	[X]

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge:

Late Filed Amendments

Applicable	Inapplicable
[ ]	[X]

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein:

Air Hazard

Applicable	Inapplicable
[X]	[ ]

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, DC 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

APPENDIX

Additional Opinion Paragraphs

31. *Minority.* Minority's original application (File No. BPH-850531MM) was returned by Commission letter dated July 26, 1985 for failing to consider short-spacing to first adjacent channel station WSB-FM, Atlanta, Georgia. This letter indicated that the application would be accepted *nunc pro tunc* if an amended application was submitted within 30 days. Minority refiled its application on August 26, 1985 specifying a site 0.3 km from its original site. This application was accepted *nunc pro tunc* by Commission letter dated November 6, 1985, and was reassigned file number BPH-850531MM.

32. An engineering analysis of the amended application indicates that this proposal is spaced 168.2 km (104.45 miles) from WSB-FM. This figure is less than the 169 km (105 miles) required by 47 C.F.R. § 73.207(a). The application contains no request for waiver of the rule. However, the engineering exhibit submitted by the applicant indicates a spacing of 104.5 miles.

33. It is clear that the applicant is using the rounding rules of 47 C.F.R. § 73.208, which, prior to June 14, 1983, permitted fractional distances to be rounded to the nearest *mile* (47 C.F.R. § 73.208(c)(5)). Under the old rules, 104.5 miles would have been rounded to 105 miles, which was considered to be acceptable. However, the Commission modified (and renumbered) this rule section effective March 1, 1984, pursuant to the conversion to the metric system adopted for the FM Service in the *Report and Order* in Docket 80-90, 94 FCC 2d 152 (1983). The new 47 C.F.R. § 73.208(c)(7) requires fractional spacing to be rounded to the nearest *kilometer*. Therefore, the 0.5 mile=0.8 kilometer short-spacing would be rounded *downward*, resulting in a 1 kilometer short-spacing. This new rule, and the resultant short spacing, was not addressed in Minority's amended application. In addition, we note that this application would be short-spaced under the old 47 C.F.R. § 73.208 (104.45 mi. rounds to 104 miles; 105 required). Accordingly, the amended application cannot be considered.

34. The same type of analysis was done on the original application. This proposal was found to be spaced 168.52 km from WSB-FM, .48 km less than the 169 km spacing required by 47 C.F.R. § 73.207. In accordance with 47 C.F.R. § 73.208(c)(7), 168.52 km rounds to 169 km. This proposal is therefore acceptable under 47 C.F.R. § 73.207(a). Accordingly, we will consider the Minority application as originally filed, and the August 26, 1985 amendment will be returned. We note that this action will not materially affect either population or area data due to the minor nature of the site change (0.3 km, 0.18 mi).

Additional Ordering Clause

35. IT IS FURTHER ORDERED, That the August 26, 1985 amendment submitted by Minority IS HEREBY RETURNED, and the application will be considered as originally filed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application of Pacific Northwest Bell Company To Acquire Part of the Property of United Telephone Company of the Northwest in Gardiner, Washington — File No. ENF-85-52

MEMORANDUM OPINION AND ORDER

Adopted October 28, 1986; Released November 14, 1986

By the Chief, Common Carrier Bureau:

1. On June 6, 1986, Whidbey Telephone Company ("Whidbey") petitioned for reconsideration of the Bureau's action approving the application of Pacific Northwest Bell Telephone Company ("PNB") to acquire the Gardiner, Washington exchange from United Telephone Company of the Northwest ("United").[1] By letter dated October 8, 1986, PNB informed the Bureau that it no longer intends to purchase the Gardiner exchange. In light of this development we find that the issues raised by Whidbey's petition have been rendered moot and conclude that the proceeding should be terminated.

2. In its letter, PNB explains that due to the imposition by the Washington Utilities and Transportation Commission (WUTC) of what it characterizes as unacceptable conditions on PNB in connection with its acquisition of the Gardiner exchange, it has withdrawn its application to purchase pending before WUTC. Therefore, states PNB, it no longer requires approval granted by the Bureau's May 2 order pursuant to Section 221 of the Communications Act. Accordingly, the relief sought by Whidbey has become moot.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Whidbey Telephone Company's Petition for Reconsideration IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] In the Matter of Application of Pacific Northwest Bell Telephone Company To Acquire Part of the Property of United Telephone Company of the Northwest in Gardiner, Washington, Mimeo No. 4042 (released May 2, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

HENRY M. ZACHS D/B/A MASSACHUSETTS - CONNECTICUT MOBILE TELEPHONE COMPANY — File No. 20182-CD-P-80

For a construction permit for an additional two-way facility for Station KCI300 to operate on frequency 152.21 MHz in the Public Land Mobile Service at Hartford, Connecticut

ORDER ON RECONSIDERATION

Adopted November 6, 1986; Released November 14, 1986

By the Chief, Common Carrier Bureau:

1. Henry M. Zachs d/b/a Massachusetts-Connecticut Mobile Telephone Company (Zachs) has filed a petition seeking reconsideration of the action of the Mobile Services Division (MSD) returning Zachs' captioned application as defective.

Background

2. On October 30, 1979, Zachs filed an application for an additional two-way facility for Station KCI300 to operate on frequency 152.21 MHz at Hartford, Connecticut. Zachs' application failed to demonstrate any public need for the service proposed, stating only: Applicant desires this station to expand its secondary paging coverage. Applicant has determined that there is a requirement by customers for coverage in the Hartford-Springfield area.
Accordingly, on April 14, 1980 the MSD sent a deficiency letter to Zachs. On May 13, 1980, Zachs filed a responsive amendment which stated the number of pagers on Zachs' system at Springfield and New Haven and stated that certain percentages of its customers in such areas had requested the proposed wide area service.

3. On May 19, 1980, the MSD sent a second deficiency letter to Zachs stating:
The letter amendment to the referenced application, dated May 13, 1980, appears to address itself specifically to paging, the secondary use of the frequency proposed for the new facility. No mention is made of the need for the primary mode of operation.
Since the frequency is primarily designated for two-way operation, it is requested that information be furnished concerning the contemplated need for two-way operation at the proposed facility.
On July 16, 1980, Zachs filed a second amendment which stated that according to a recent public need survey, it had 38 mobile subscribers at Springfield and over 160 mobile subscribers at Hartford on Station KCC803. Zachs also stated that its proposed additional two-way facility would afford additional flexibility in providing mobile service and that the facility would also supply transient paging.

4. By letter dated October 22, 1981, the MSD returned Zachs' application as defective. The MSD letter stated that the application as amended:
. . . only demonstrates a need for one-way service. As such, the application violates Section 22.501(b) of our rules which requires that the frequency requested be used primarily for two-way common carrier service . . . Therefore, pursuant to Section 22.20(a)(2) of the Commission's Rules, the Division is hereby returning the above-referenced application as defective.

5. On November 30, 1981, Zachs filed a petition seeking reconsideration of the MSD action and reinstatement of its application which was simultaneously retendered for filing. In its petition, Zachs argues that the return of its application violated Section 309(e) of the Communications Act, 47 U.S.C. Section 309(e), which requires designation for hearing in the event the Commission is unable to grant an application. While recognizing that the Commission may dismiss as defective an application which violates validly promulgated rules or regulations,[1] Zachs argues that the Commission has never clarified, by rulemaking proceeding, what is meant by the Section 22.501(b) authorization to use the involved two-way frequency for one-way service "on a secondary basis." Zachs contends that without a well defined interpretation of "secondary", the MSD was required to designate the Zachs application for evidentiary hearing.

Discussion

6. After careful consideration of the evidence and arguments presented, we conclude that Zachs' arguments lack merit, and its petition will be denied.

7. Section 22.20(a)(2) of the Commission's rules provides that an application will be unacceptable for filing and will be returned if:
(2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information, or other requirements.
Moreover, Public Notice, Mimeo 30894, issued on April 24, 1980, the MSD gave notice of its intent to begin strict enforcement of Section 22.20, stating:
We recommend that all applications on file be reviewed to make sure they are complete and free of any defects. We intend to begin enforcing this policy strictly, as contemplated by our rules and emphasized on the front of our "accepted for filing" public notices. Effective June 30, 1980, applications that are found upon examination to be blatantly defective will be returned immediately.
Thus, Zachs clearly received notice that its application would be returned if it was found to be blatantly defective.

8. We also find that Zachs' application was properly determined to be blatantly defective, and we reject Zachs' arguments concerning clarification of the requirements of Section 22.501(b) of the Commission's rules. The Commission's rules and *Long Island Paging*, 30 FCC 2d 405 (1971), *aff'd* 32 FCC 2d 235 (1971) and its progeny, have long required applicants to establish a public need for a proposed facility. We have made clear that "any need showing must be based upon the frequency's assigned use as set forth in the Commission's Rules . . .," and that a showing of need solely for one-way service on a secondary basis " . . . is not sufficient to establish need for a two-way frequency." *Empire Paging Corporation*, Mimeo 07230, released February 24, 1981.[2] *The Empire Paging* decision, which eliminated any possible confusion concerning the propriety of supporting a two-way frequency request sole-

ly with a one-way need showing, was released seven months prior to the MSD action returning Zachs' application.[3] Moreover, the MSD's second request to Zachs for need information was specific in stating the required standard. During such seven month period, Zachs could have cured the defect in its application through the filing of an amendment demonstrating a public need for the two-way frequency involved. *See Allen C. Moore*, 86 FCC 2d 787 (1981) and *Norman M. and Maury S. Schklar*, Mimeo 6336, released August 13, 1985. Since Zachs had notice that its need showing was deficient, and since Zachs chose not to avail itself of the ample opportunity provided to cure such defect through amendment, we must find that the MSD's return of Zachs' application was proper. We will deny Zachs' petition for reconsideration.

9. Zachs' application, as retendered on November 30, 1981, must also be returned as defective. While Zachs' petition indicates that Zachs " . . . currently is preparing an amendment which . . . will be filed shortly . . . ", there is no record of any amendment actually being filed. Thus, Zachs' retendered application continues to contain a deficient need showing and will be returned.

10. Accordingly, IT IS ORDERED, That the petition filed on November 30, 1981 by Henry M. Zachs d/b/a Massachusetts-Connecticut Mobile Telephone Company IS DENIED.

11. IT IS FURTHER ORDERED, That the application retendered on November 30, 1981 by Henry M. Zachs d/b/a Massachusetts-Connecticut Mobile Telephone Company IS RETURNED as defective.

12. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

[2] At the time the subject application was filed, the Commission allowed the use of two-way frequencies for one-way service "on a secondary basis." Subsequently, we revised the rule to allow paging service on a two-way frequency only if the frequency offers two-way service as well. *Report and Order* in C.C. Docket No. 80-57, 49 Fed. Reg. 3296, 3316, published January 26, 1984. Even under the revised rule, the Zachs application is defective because its need showing does not demonstrate need for two-way service. *See* Iowa Radio Service, Inc., Mimeo No. 5457, released June 28, 1985.

[3] The clear definition of the Commission's application requirements and the notice thereof required by the Stor er doctrine are both satisfied under the circumstances presented.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FAIRCHILD COMMUNICATIONS NETWORKS MANAGEMENT CO. File No. CSG-86-074-P/L

Application for authority to construct and operate an earth station at Trexlertown, Pennsylvania for provision of INTELSAT Business Services

ORDER AND AUTHORIZATION

Adopted: November 7, 1986 Released November 14, 1986

By the Common Carrier Bureau:

1. The Commission is considering an application filed on September 25, 1986 by Fairchild Communications Networks Management Co. (FCNM), requesting authority, pursuant to Title III of the Communications Act of 1934 and Sections 201 (c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962 to construct and operate international earth station facilities at Trexlertown, Pennsylvania for provision of INTELSAT Business Services (IBS). The application was placed on public notice on October 1, 1986. No comments were received. The applicant has been granted blanket authority to establish and operate channels of communication between the U.S. and various overseas points for provision of IBS services.[1]

2. The proposed earth station will consist of a 3.7 meter antenna connecting with an INTELSAT V satellite in the 11/14, 12/14, GHz band. The proposed earth station will be located at Trexlertown, Pennsylvania on customer premises, and will be used to provide a full range of IBS services. The approximate cost of the requested facilities will be $250,000.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[3] The Commission has granted other applications to construct and operate earth stations based on this approach.[4]

4. FCNM has the legal, technical and financial qualifications to construct and operate the proposed earth station. FCNM is a Delaware Corporation established as a wholly-owned subsidiary of Fairchild Industries, Inc. (Fairchild) for the purpose of owning, operating and maintaining private and shared satellite communications networks for customers. The proposed earth station complies with INTELSAT performance criteria for IBS stations. FCNM has completed the necessary frequency coordination.

5. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed stations. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of the requested services and facilities is required by the public convenience and necessity.

7. Accordingly, IT IS ORDERED, pursuant to Section 304, 309, and 319 of the Communications Act of 1934, and Section 201(c) of the Communications Satellite Act of 1962, that application File No. CSG-86-074-P/L IS GRANTED, and FCNM is authorized to construct and operate the proposed earth station at Trexlertown, Pennsylvania to provide IBS and related digital video services.[5] Before completion of the equipment installation and facility activation, however, the applicant should provide the Commission with a summary of actually installed equipment.

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Fairchild Communications Networks Management Co., released October 9, 1986, File No. I-T-C-86-159.

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). The Commission will limit the use of the facilities authorized for provision of IBS or

television services. Carriers must seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COLUMBIA CELLULAR TELEPHONE COMPANY File No. 33229-CL-P-95-A-84

For authority to construct and operate new facilities in the Domestic Public Cellular Radio Telecommunications Service on frequency block A in the Columbia, South Carolina Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted November 6, 1986; Released November 14, 1986

By the Common Carrier Bureau:

1. South Carolina Cellular Communications (SCC) has filed a petition to deny the captioned application for the non-wireline cellular construction permit for the Columbia, South Carolina Metropolitan Statistical Area (Columbia MSA). The application of Mobile Phone of Texas (Mobile Phone) was selected first in the lottery for this market on February 24, 1986. Mobile Phone's application was amended March 19, 1986 to substitute the settlement partnership called Columbia Cellular Telephone Company (Columbia Cellular) as the applicant. The Commission announced Columbia Cellular as the tentative selectee with the ownership, legal, and financial proposals of Mobile Phone surviving.[1] *Public Notice, Report No. CL-86-104, released April 2, 1986. Columbia Cellular opposes the petition.*

2. SCC alleges that Columbia Cellular has not demonstrated reasonable assurance that it has sufficient financing for the construction of its proposed system and its first-year operating expenses. SCC contends that the letter from the First National Bank of Chicago (First Chicago) contains boiler-plate language intended to apply to financing multiple markets and thus is non-specific as to the Columbia MSA. Consequently, argues SCC, it is doubtful whether the bank knew anything about the proposed facility, including the cost and financial information. SCC also asserts that First Chicago's letter does not specify what guarantees Columbia Cellular's partners must fulfill, and as a result, fatally omits a pertinent term of the loan.

3. In addition, SCC asserts that the amendment of March 19,1986, fails to comply with Section 22.13(a)(1)(i) because it does not disclose for each of four "key management personnel", who are members of Columbia Cellular's "Executive Committee", the subsidiaries or businesses in which these individuals hold 5% or more interest.

4. Columbia Cellular responds that the bank letter clearly commits funding for the partnership, as evidenced by the letter's addressee (the Chairman of the Columbia Cellular partnership), the numerous references to Columbia Cellular in the body of the letter, and the stated purpose to finance system construction. Columbia Cellular also contends that a letter of assurance need not contain specific details of any guarantee required for the loan. It further notes that Columbia Cellular has agreed to and accepted all terms and conditions set by the letter, including the guarantee condition.

5. To the second allegation, Columbia Cellular responds that the information required by Section 22.13(a)(1)(i) can be found for each of the executive committee members in the applications already on file with the Commission, and that its March 19, 1986 amendment disclosed the file numbers of these applications. Finally, South Carolina provides a supplement to its application containing the Section 22.13(a)(1)(i) information.

Discussion

6. In the *Cellular Lottery Rulemaking*, 98 FCC 2d 175, 219 (1984), we placed fourth round cellular applicants on notice that a reasonable assurance of financial ability to construct and operate their proposed system would be required. We have stated that to meet this reasonable assurance test, as set forth in *Multi - State Communications, Inc.*, 590 F. 2d 1117 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 959 (1979), a bank letter must identify the applicant, be market specific, and contain sufficient terms of the proposed loan. *See Order on Reconsideration*, FCC 86-46, Mimeo No. 36444, released January 24, 1986, at para. 14.

7. We recently reviewed an almost identical letter from First Chicago in *Shreveport Cellular Co.*, Mimeo No. 6826, released September 11, 1986, and found that letter complied with our reasonable assurance test. Likewise, we find that the First Chicago letter here complies with this standard. The letter identifies Columbia Cellular as tentative lottery selectee for the Columbia MSA, expresses the bank's willingness to provide $5 million to Columbia Cellular, and specifies Columbia Cellular as the intended recipient of the loan for the Columbia market. It also describes the conditions for receipt of the loan including the documents to be executed and the collateral and other guarantees to be given.

8. The second issue concerning disclosures of Columbia Cellular's executive committee members is rendered moot by its supplement, which confirms the previously filed information required by Section 22.13(a)(1)(i). We find, therefore, that its application is financially and technically acceptable. We reiterate that as a general matter, executive committee members are "key management personnel" of the applicant, and as such must provide a list of their subsidiaries. *See Huntington Cellular Telephone Company*, Mimeo 7087, released September 25, 1986.

9. Accordingly, IT IS ORDERED That the Petition to Deny filed by South Carolina Cellular Communications IS DENIED.

10. IT IS FURTHER ORDERED, That the application of the tentatative non-wireline lottery selectee for market no. 95, Columbia Cellular Telephone Company (File No. 33229-CL-P-95-A-84), IS GRANTED.

11. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The partnership adopted the technical proposal of Cellular Mole, File No. 32323-CL-P-95-A-84.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ARNOLD C. LEONG File No.37267-CL-P-174-A-86

For a construction permit to
establish a cellular system
operating on Frequency Block A in
the Domestic Public Cellular Radio
Telecommunications Service for the
Lafayette, Louisiana Metropolitan
Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted November 7, 1986; Released November 14, 1986

By the Common Carrier Bureau:

A. Introduction

1. Gary F. Anderson (Anderson)[1] has filed a petition to deny the above-captioned application for the non-wireline construction permit for the Lafayette, Louisiana Metropolitan Statistical Area (MSA). The application of Arnold C. Leong (Leong) was selected first in the lottery held for the market on June 27, 1986. The Commission announced Leong as the tentative selectee in *Public Notice*, Report No. CL-86-339, released August 1, 1986. The petition is opposed by Leong.

B. Financial Qualifications

2. Anderson alleges that Leong has failed to demonstrate that he has a firm financial commitment. Anderson notes that Leong relies on a financing letter from Mitsubishi Electric America, Inc. (MEA) and that MEA in turn relies on financing from its parent, Mitsubishi Electric Corporation (MELCO). Anderson asserts that because MELCO's balance sheet is current only as of March 31, 1985, Leong has failed to demonstrate his financial ability to construct and operate the proposed system.

3. Leong responds that MELCO has the capability to fund the proposed system. He points out that the total assets of MELCO for the years ending March 31, 1985 and March 31, 1984 were, respectively, approximately $7.3 and $6.3 billion. Noting that these assets substantially exceed the $1,721,686 commitment MEA provided for the Lafayette non-wireline system, he refers to the line of Commission precedent holding that a demonstration of ownership of total assets vastly in excess of the amount committed will substitute for a net liquid assets showing.[2] He concludes that an assets-to-commitment ratio of 4,218 to 1 for 1985 and 3,684 to 1 for 1984 demonstrates that there is no reasonable argument that MELCO lacks the capability to finance the proposed system. Leong also asserts that because there is no Commission rule regarding age of a balance sheet provided by a financing entity that is other than a recognized lending institution, there is no procedural defect in his financial showing.[3]

Discussion

4. Section 22.917(b)(1)(i) of the Rules requires applicants obtaining financing from entities other than a recognized lending institution to submit proof that the financing entity has the funds available and uncommitted to another cellular application. The August 25, 1986 MEA letter demonstrates that MEA, as an entity other than a recognized lending institution, has the funds available and uncommitted to another cellular application. MELCO's July 18, 1986 letter agrees to provide MEA funding up to an amount of $30,000,000. MELCO's attached balance sheet demonstrates, under the "total assets" test, that it has sufficient assets to fund a maximum $30,000,000 commitment. Its total net assets for the year ending March 31, 1985 were approximately $1.6 billion. Thus, its total assets-to-commitment ratio is over 53 to 1. This is considerably stronger financial showing than that found acceptable in *American Cellular Corp., supra.*

5. After careful review of the application and associated pleadings, we find Arnold C. Leong legally, technically and otherwise qualified to become a Commission licensee.

C. Ordering Paragraphs

6. Therefore, for the foregoing reasons, IT IS ORDERED, That the application of Arnold C. Leong, File No. 37267-CL-P-174-A-86, IS GRANTED.

7. The Petition to Deny filed by Gary F. Anderson IS DENIED.

8. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Anderson is an applicant for the non-wireline construction permit in Lafayette, Louisiana. Anderson was not selected as one of the top-ten ranked applicants in the June 27, 1986 lottery for the market.

[2] *See American Cellular Corp.*, 103 F.C.C. 2d 26, 30-31 (1986) (a demonstration of total net assets in excess of 14 times the amount of the commitment is sufficient to dispense with the net liquid assets requirements).

[3] Leong concludes that the absence of a requirement in the Commission's rules on the age of a lender's balance sheet demonstrates the Commission's intent to leave to the applicant's discretion what evidence it will submit to show that its lender has sufficient funds available and uncommitted to another cellular system. Nonetheless, Leong submits a balance sheet for MELCO for the year ending March 31, 1986. It shows total assets of over $10.7 billion and total net assets of over $2.7 billion.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-407

ERRATUM

Released: November 13, 1986

The Hearing Designation Order (DA 86-79) in the Ukiah, CA proceeding includes a release date of October 31, 1986. Inadvertently, the Commission failed to release the HDO on that date. This erratum corrects the release date of the HDO to November 13, 1986. Written appearances will be due 20 days after the mailing of this erratum.

Federal Communications Commission

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 86-407

BOTT COMMUNICATIONS, INC. File No. BPH-850314MA
(hereafter Bott)
Ukiah, California
Req: 105.9 MHz, Channel 290B
2.8 kW (H & V), 554 meters

CLAUDIA CLARKE AND THEODORE S. STORCK, d/b/a REDWOOD EMPIRE BROADCASTING File No. BPH-850529MB
(hereafter Redwood)
Ukiah, California
Req: 105.9 MHz, Channel 290B
2.8 kW (H & V), 545 meters

JOSEPH M. PEREZ File No. BPH-850529MD
(hereafter Perez)
Ukiah California
Req: 105.9 MHz, Channel 290B
2.5 kW (H & V), 573 meters

MARILYN J. JOHNSON File No. BPH-850531MB
(hereafter Johnson)
Ukiah, California
Req: 105.9 MHz, Channel 290B
2.5 kW (H & V), 570 meters

SOUND SENSE, A CALIFORNIA LIMITED PARTNERSHIP File No. BPH-850531MK
(hereafter Sound Sense)
Ukiah, California
Req: 105.9 MHz, Channel 290B
2.95 kW (H & V), 562 meters

For Construction Permit
for a New FM Station

HEARING DESIGNATION ORDER

Adopted: October 16, 1986 **Released: October 31, 1986**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In the interest of administrative efficiency and resource economy, portions of this Order have been standardized. Consequently, opinion paragraphs, issues and ordering clauses will only apply where an "X" appears in an appropriate box. If the paragraph is directed to some, but not all, of the captioned applicants, those affected will be specified. In addition, non-standardized text in this Order, if any, will be set forth in an Appendix.

OPINION PARAGRAPHS

Local Notice

Applicable	Inapplicable
[ ]	[X]

3. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. We have no indication that the applicant(s) below published the required notice. To remedy this deficiency, the applicant(s) must publish local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT(S):

Applicable	Inapplicable
[ ]	[X]

4. Applicants for new broadcast stations are required by Section 73.3580 of the Commission's Rules to give local notice of the filing of their applications. The applicant(s) below has published the required notice, but the notice is deficient. To remedy this deficiency, the applicant(s) must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT (S) DEFICIENCY

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

5. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below proposes to locate its main studio outside that community and gives the following justification(s):

APPLICANT(S) LOCATION(S) JUSTIFICATION(S)

(a) good cause has been shown by the following applicant(s) for the proposed main studio location:

(b) good cause has not been shown by the following applicant(s) and, accordingly, an issue will be specified.

Applicable	Inapplicable
[ ]	[X]

6. Section 73.1125 of the Commission's rules requires that the main studio of an FM station be located within the city of license, but that on a showing of good cause may be located outside that community. The applicant(s) below states in its response to Item 12, Section V-B, Form 301, that its main studio will be at a location to be determined, with no indication that the determination

would be limited to sites within the city of license. Under these circumstances, the applicant(s) will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, either an amended response to the above-referenced item and/or, if applicable, a showing of good cause should it propose to locate its main studio outside the city of license, or an appropriate issue will be specified by the Judge.
APPLICANT (S):

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

7. The engineering data submitted by the applicant(s) below does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission Rules:
APPLICANT (S) WAIVER JUSTIFICATION (S)

(a) The following applicant(s) has submitted facts and circumstances which persuade us that grant of a waiver of Section 73.315(a) would be in the public interest:

(b) The following applicant(s) has not shown circumstances which warrant a waiver of 73.315(a) and, accordingly, an issue will be specified:

(c) The following applicant(s) has not requested a waiver of 73.315(a) and, accordingly, an issue will be specified:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

8. The material submitted by the applicant(s) below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:
APPLICANT (S) DEFICIENCY

Applicable	Inapplicable
[ ]	[X]

9. The applicant(s) below has certified as to its financial qualifications. The certification, however, does not substantially meet the certification set out in revised Section III, Form 301. Accordingly, the applicant(s) will be given 30 days from the release of this Order to submit to the presiding Administrative Law Judge the certification required by the form or to advise the Judge that it cannot make the required certification. In the latter event, the Judge shall specify an appropriate issue.
APPLICANT (S):

Programming Statement

Applicable	Inapplicable
[ ]	[X]

10. The applicant(s) below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to Paragraph 1, Section IV, Form 301. Accordingly, the applicant(s) will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.
APPLICANT (S):

E.E.O.

Applicable	Inapplicable
[ ]	[X]

11. The material submitted by the applicant(s) below fails to indicate that it will have less than five full-time employees. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Accordingly, the applicant(s) will be required to file this Section VI information within 30 days of the release of this Order with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.
APPLICANT (S):

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

12. The applicant(s) below has petitioned for leave to amend its application on the date(s) shown. The accompanying amendment(s) was(were) filed after the "B" cut-off date, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment(s) is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment(s) will be disallowed.

APPLICANT(S)	DATE AMENDMENT(S) FILED
Bott	March 12, 1986
Sound Sense	June 6, 1986

Areas & Populations

Applicable	Inapplicable
[X]	[ ]

13. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would

receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

14. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

Different Communities 307(b)

Applicable	Inapplicable
[ ]	[X]

15. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

Air Hazard

Applicable	Inapplicable
[X]	[ ]

16. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant(s) below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT(S): Bott, Redwood, Perez, Johnson, Sound Sense

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

ISSUES

Main Studio

Applicable	Inapplicable
[ ]	[X]

To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the community of license by the following applicant(s):

City Coverage

Applicable	Inapplicable
[ ]	[X]

1. To determine whether the proposal of the following applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 8, the applicant(s) is financially qualified:

Air Hazard

Applicable	Inapplicable
[X]	[ ]

To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant(s) would constitute a hazard to air navigation: Bott, Redwood, Perez, Johnson, Sound Sense

307(b)

Applicable	Inapplicable
[ ]	[X]

To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

Contingent Comparative

Applicable	Inapplicable
[ ]	[X]

To determine, in the event it is concluded that choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

Comparative

Applicable	Inapplicable
[X]	[ ]

3. To determine which of the proposals would, on comparative basis, best serve the public interest.

Ultimate

Applicable	Inapplicable
[X]	[ ]

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

ORDERING CLAUSES

Legal Notice

Applicable	Inapplicable
[ ]	[X]

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether local notice of filing of the application has been published:

Applicable	Inapplicable
[ ]	[X]

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished:

Main Studio Justification

Applicable	Inapplicable
[ ]	[X]

21. IT IS FURTHER ORDERED, That the following applicant(s) shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amended response to Item 12, Section V-B, Form 301, and, if appropriate, a showing of good cause if its respective main studio will be located outside the city of license:

City Coverage Waiver

Applicable	Inapplicable
[ ]	[X]

22. IT IS FURTHER ORDERED, That, as to the following applicant(s), the provisions of Section 73.315(a) ARE WAIVED to permit a signal level of less than 3.16 mV/m over the entire city of license:

Financial Qualifications

Applicable	Inapplicable
[ ]	[X]

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit the financial certification required by Section III, Form 301, or advise the presiding Administrative Law Judge that the required certification cannot be made:

Programming Statement

Applicable	Inapplicable
[ ]	[X]

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area:

E.E.O.

Applicable	Inapplicable
[ ]	[X]

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant(s) shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge:

Late Filed Amendments

Applicable	Inapplicable
[X]	[ ]

26. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant(s) IS GRANTED, and the corresponding amendment(s) IS ACCEPTED to the extent indicated herein: Bott, Sound Sense

Air Hazard

Applicable	Inapplicable
[X]	[ ]

27. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

28. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

APPENDIX

Additional Opinion Paragraphs

30. Although all the applicants in this proceeding have proposed to locate their tower at or adjacent to the existing KWNE-FM tower site, both Perez and Redwood have stated that the Ukiah office of the Bureau of Land Management (hereafter "BLM") has informed them that the eventual permittee will be asked to relocate to another site of BLM's choosing on Cow Mountain. This information was confirmed in a conversation with an employee at the Ukiah BLM on August 12, 1986. The employee stated that the proposed new site would be located approximately 450 feet from the existing KWNE-FM tower-site. We were also informed that there has been a delay in finalizing the proposed new site due to a "right-of-way" dispute that should be resolved shortly with the site to be made available on or about December 15, 1986. Consequently, in the event of a change in the proposed tower location, Bott, Redwood, Perez, Johnson, and Sound Sense are reminded that they will be required to file with the presiding Administrative Law Judge an amended Section V-B and V-G, Form 301, within 30 days of notification to these parties of the approval and finalization of the proposed new site.[1]

31. A "Petition to Dismiss and Deny Application For Construction Permit and Amendments Thereto Filed By Sound Sense" (hereafter "Petition") was filed on September 13, 1985 by Marilyn J. Johnson, an applicant in this proceeding. The Petition alleged that the Sound Sense application should be dismissed because it was "fundamentally defective and unacceptable" at the time of filing because the applicant answered "No" to Item 3(a) of Section II, Form 301, as to whether Ms. Vidya Tolani, the sole shareholder of the applicant, complied with the alien ownership provision of Section 310 of the Communications Act of 1934, as amended. In addition, the Petition alleged that the "B" cut-off date was May 31, 1985 and that Sound Sense had attempted to improve its comparative status after this cut-off date by specifying the installation of an auxiliary generator in an amendment dated August 15, 1985 and had attempted to correct a patently unacceptable application through an amendment, dated September 11, 1985, stating that Ms. Tolani had been naturalized as a United States citizen on September 3, 1985.

32. Sound Sense notes correctly in its September 25, 1985 Response that the "B" cut-off date was in fact October 25, 1985, not May 31, 1985 as alleged in the Petition. The May 31, 1985 date was merely the "A" cut-off date for submission of mutually exclusive applications. Further, Sound Sense explains that its "No" answer to Item 3(a), Form 301, was in reality a "qualified affirmative answer" because an exhibit had been attached stating that Ms. Tolani had applied for U.S. citizenship, taken all tests, prepared all documents, and completed the required interview. A delay in her swearing in had been occasioned by a "mix-up in the files." The formal swearing in had in fact taken place on September 3, 1985, before the "B" cut-off date, October 25, 1985. Sound Sense also argues that its August 15, 1985 amendment specifying the installation of an auxiliary generator was not filed to improve its comparative position. Once again, we note that this amendment was clearly filed before the October 25, 1985 cut-off date.

33. It is well established that alien ownership is a basic qualifying issue. *See Washington's Christian Television Outreach , Inc .*, 99 FCC 2d 395, 407 (1984). While competing parties do take part in litigation over such issues, those applicants "have no vested right to bar an application amendment which would remove a basic disqualifying hurdle from a competitor's path; that is a procedural prerogative of the Commission." *Washington ' s Christian Television Outreach , Inc .*, 99 FCC 2d 395, 407 (1984). *See also Azalea Corp .*, 31 FCC 2d 561, 563 (1971). We have also noted that, in applying our procedural rules, "the underlying purposes of those rules is to ensure that rigidity does not override those purposes, justice, or equity." *Son Broadcasting Inc .*, 92 FCC 2d 450, 452 (1982).

34. Consequently we conclude, based on the evidence before us, that Sound Sense did not violate the letter and spirit of the alien ownership provisions. The applicant did respond to the certification of compliance in Item 3(a), Form 301. Although the question was answered "No", we believe that this response was properly qualified by the attached exhibit indicating that Ms. Tolani had previously completed all requirements for U.S. citizenship. The exhibit indicated that there had merely been a delay in her

swearing in due to a "mix-up in the files." Further, the applicant kept us apprised of the status of Ms. Tolani's petition for naturalization in an amendment dated August 15, 1985 and informed us, in a September 11, 1985 amendment, that she had been sworn in on September 3, 1985 in the District Court of the Northern District of California. Once again, we note that this "curative" amendment was filed well before the "B" cut-off date of October 25, 1985 and we conclude that the amendment is acceptable. *See also Metromedia Radio & Television Inc .*, 102 FCC 2d 1334, 1341 (1985). This rationale is also applicable to the August 15, 1985 amendment specifying the installation of an auxiliary generator which was timely filed as a matter of right prior to the "B" cut-off date pursuant to 47 C.F.R. Section 73.3522(a)(2). Consequently, we will deny the Petition.

Additional Ordering Clause

36. IT IS FURTHER ORDERED. That the petition to dismiss and deny application filed by Marilyn J. Johnson IS DENIED.

FOOTNOTES

[1] In answering Questions 16 of Section V-B, the applicants will be required to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed Red. 14999 (1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added Section 1.1307 of the Commission's Rules. If the applications are subject to environmental processing under the Section 1.1307 criteria, the applicants must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised Section 1.1311 of the Commission's Rules. The applicants should be aware that all of their currently proposed antenna heights located in close proximity to other antennae pose possible radiation hazard problems. We are unable at this time to determine whether a proposed new site would require the applicants' submission of assessments, but the applicants are reminded of their obligation for making such a determination and submitting an EA if such a document proves to be necessary. In addition, we are uncertain as to whether any proposed new site will constitute a hazard to air navigation. Accordingly, we will expect the applicants to obtain the necessary clearance if a new site is specified.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MTS and WATS Market Structure — **CC Docket No. 78-72**

Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board — **CC Docket No. 80-286**

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: November 4, 1986 Released:November 14, 1986

By the Commission: Commissioner Dennis not participating.

I. Introduction

1. BellSouth Corporation (BellSouth), NYNEX Corporation (NYNEX), The National Telephone Cooperative Association (NTCA) and Puerto Rico Telephone Company (PRTC) have filed petitions for reconsideration of this Commission's *Decision and Order* regarding the separation of equal access costs between the state and interstate jurisdictions.[1] Southwestern Bell Telephone Company (Southwestern) and Bell Atlantic Corporation (Bell Atlantic)[2] filed petitions to defer the effective date of the *Order*. Mountain States Telephone Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company filed a petition for waiver of our rules to defer the effective date of the *Decision and Order*.[3] For the reasons explained below, we conclude that the petitions for reconsideration filed by BellSouth, NTCA, NYNEX and PRTC fail to raise matters which warrant reconsideration, and we therefore deny them. The petitions requesting a deferral of the *Decision and Order's* effective date were addressed in another proceeding, and are dismissed herein as moot.

II. Background

2. Equal access costs are incurred by exchange carriers to provide facilities to competitive interexchange carriers that are equivalent to those provided to AT&T. Network reconfiguration costs are incurred by the Bell Operating Companies (BOC) in reconfiguring the telephone network to conform to the Local Access and Transport Area (LATA) boundaries prescribed by the court in the *Modification of Final Judgement* (MFJ).[4] In order to assess the separations impact of equal access and network reconfiguration costs, we sought recommendations from the Federal-State Joint Board.[5]

3. In our *Decision and Order* in the instant docket, we adopted the recommendation of a Federal-State Joint Board concerning the separations treatment of equal access and reconfiguration costs. The Joint Board recommended that no changes be made in the procedures for allocating network reconfiguration costs. It also recommended that equal access costs for separations purposes should include only the initial incremental presubscription costs and initial incremental expenditures for hardware and software directly related to the provision of equal access which would not be required to upgrade the switching capabilities of the office involved absent the provision of equal access. In essence, the equal access cost category was limited to: (1) the cost of converting end offices which serve competitive interexchange carriers, or (2) the cost of converting offices in response to bona fide requests for equal access. This approach excluded: (1) tandem switches that provide a connection for equal access traffic; (2) the financial cost of advancing construction projects in order to implement equal access; (3) ongoing or continuing software maintenance costs related to the new software generic program, (although the cost of the two year initial warranty would be included); (4) certain administrative costs; and (5) expenses incurred prior to January 1, 1984, the date of divestiture. The *Decision and Order* required carriers to implement these changes in cost allocation by February 20, 1986.

III. Summary of Pleadings

4. In their petitions, NTCA, BellSouth, NYNEX and PRTC request expansion of the "equal access" cost category to include various additional costs that they contend are generated by equal access. NTCA seeks reconsideration of our requirement that equal access costs be limited to those costs incurred in response to a bona fide request for conversion to equal access. As part of an effort to attract competing interexchange carriers to their exchanges, NTCA requests that we permit exchange carriers installing equal access to establish a separate "equal access" cost category for rural carriers to encourage equal access in their areas of operation. NTCA contends that retaining the rule as it is presently written acts as a severe disincentive for rural exchange carriers trying to provide equal access capability and tends to discourage the spread of competitive toll service to rural subscribers.

5. In its petition, BellSouth also requests that we include in our definition of equal access costs the cost of tandem switches because these switches reduce the number of connections that an interexchange carrier would otherwise obtain on an end office by end office basis. BellSouth believes the placement of access tandems benefits both the interexchange carriers and consumers because the cost of equal access is less than what it would have been had the carrier been required to connect directly to the end offices. Finally, BellSouth concludes that this Commission's decision is overly restrictive since it limits the conditions under which equal access costs may be incurred.

6. PRTC requests the inclusion of voluntary conversion costs in the equal access category because it is currently in the process of upgrading its central offices in the San Juan area. PRTC claims its intrastate ratepayers will be forced to pay a disproportionate share of these costs even though these conversions will accelerate competitive entry into the market and will save interstate and international ratepayers substantial sums of money. BellSouth, NTCA and NYNEX join with PRTC in requesting that the costs of all end office conversions be included in the equal access category whether or not there is competition or a bona fide request for equal access at a particular end office.

7. NYNEX argues in its petition that the equal access cost category should also include the full costs of software maintenance programs for a period of five years and not the two year period established in our *Decision and Order*. NYNEX also argues that the equal access cost category

should include periodic payments for ongoing software maintenance programs related to equal access software. NYNEX submits that such software maintenance programs would not be purchased absent conversion to equal access, and therefore are necessary if local exchange carriers are to avoid service interruptions caused by software failures. Finally, NYNEX claims that inclusion of ongoing software maintenance for a period of five years rather than two years is an absolute necessity.

8. Bell Atlantic and Southwestern, in their petitions, request a delay in the implementation date of the order to May 1, 1986 so that they will have sufficient time to make all the necessary changes to accommodate Part 67 of our Rules. Because these changes, according to Bell Atlantic, will allocate more equal access costs to the interstate jurisdictions, Bell Atlantic seeks additional time to revise its interstate tariffs in order to recover the additional costs. Mountain States, Northwestern Bell and Pacific Northwestern Bell also seek a delay to April 1, 1986 for basically the same reasons.

9. AT&T, in its opposition to the petitions for reconsideration, submits that these same arguments for expansion of the equal access cost category were fully considered and properly rejected in our *Decision and Order* and are therefore without merit. AT&T argues that petitioners have provided no new information that would justify reconsideration of our finding that conversion costs voluntarily incurred by the local exchange carriers should be excluded from the equal access category. Further, AT&T contends that in selecting an equal access minutes allocation factor for the equal access category over a toll minutes allocation factor, we struck a careful balance between the choice of the allocator and the definition of the costs to which it applies. Finally, AT&T contends that petitioners seeking reconsideration of our *Decision and Order* ignore our concern with the high interstate assignments caused by the use of the equal access minutes allocator.

10. In reply to AT&T, BellSouth submits that the record in this proceeding contains compelling reasons for reconsideration of our *Decision and Order*. BellSouth reiterates its argument that this Commission should not exclude from the equal access cost category the cost of tandem switches and voluntarily incurred conversion costs. BellSouth also observes that AT&T was the only commenting party to oppose the petitions for reconsideration. BellSouth claims that AT&T has failed to meet its burden of proof in establishing why the Commission should deny these petitions for reconsideration.[6] In its reply comments, NYNEX merely restates the position it advocates in its petition for reconsideration. The Pacific Companies argue in their reply that AT&T mischaracterizes our definition of equal access costs because of AT&T's concern that a higher allocation of costs to the interstate jurisdiction will result from the changes advocated by the petitioners. The Pacific Companies argue that we should not be concerned with the level of the interstate cost allocation, but rather with the propriety of the allocation and asserts that the modifications advocated by the petitioners achieve that goal. Finally, PRTC states in its reply that AT&T's opposition is predicated on incorrect premises. First, PRTC claims that AT&T incorrectly asserts that this Commission chose its equal access minutes usage allocator instead of a toll minute allocator because of the limitations prescribed regarding the costs. Second, according to PRTC, AT&T incorrectly presumes that local ratepayers derive advantages from the voluntary implementation of equal access and therefore should bear the costs of such conversion. PRTC contends that AT&T's arguments are without merit and should be dismissed.

IV. Discussion

11. As indicated in paragraphs 4 to 7 above, NTCA, BellSouth, NYNEX and PTRC have raised questions regarding the components to be included in equal access for separations purposes. We have reviewed their arguments in light of the findings in the *Decision and Order*, and conclude that no arguments have been raised that were not previously considered or that would justify changing the *Decision and Order*.

12. Many of the petitioners have failed to recognize that our decision to adopt a particular definition of a separations category does not affect any carrier's right to recover costs that are attributable to telecommunications services from ratepayers. Costs that are excluded from the equal access separations category will be included in some other separations category, will be apportioned between the state and interstate jurisdictions and will be included in some revenue requirement. The separations classification and choice of an allocation factor may, of course, have an indirect effect upon carrier revenues because different commissions select different authorized rates of return. The ultimate purpose of separations is, however, to achieve an equitable division of costs between interstate and intrastate ratepayers. None of the petitioners have demonstrated that the equal access definition and allocation factor we adopted will not serve that purpose. Indeed most of the petitions do not even address the relevant question.

13. Some petitioners may be motivated by a concern that any definition of an equal access category that we adopt for separations purposes will be used for purposes of the MFJ guarantee from AT&T to the Bell Operating Companies. We are confident that the guarantee will be interpreted in a manner that is suitable for that purpose.

14. We do not accept the argument by BellSouth and NYNEX that the cost of new tandem switches should be included in equal access. This Commission and the Joint Board carefully considered this argument and concluded that these switches handle other toll and local traffic, and that the current allocation procedures were an accurate method for allocating costs between these different uses. The petitioners have not raised any new arguments that were not previously considered, or that alter the validity of our initial resolution. BellSouth's argument that substantial costs would be incurred if interexchange carriers are required to connect directly to an end office may be valid. However, we have not instructed carriers to connect directly to end offices if the construction of new switches is more beneficial. Instead, in the *Decision and Order*, we concluded that items such as tandem switches benefit services other than equal access and concluded that existing separations procedures were appropriate. We reaffirm our position in the *Decision and Order* that the cost of new tandem switches should not be included in equal access.

15. NYNEX argues that we should include in the equal access cost category the full cost of software maintenance programs for a period greater than two years as well as periodic payments for ongoing software maintenance related to equal access software. The Joint Board recommended that the ongoing costs of software maintenance be excluded from equal access costs because they are not

necessarily related to the implementation of equal access. This is due in part to the fact that such maintenance covers the entire generic program, and not merely the equal access features. The maintenance contract is not for the initial conversion but for the ongoing operation of facilities used to provide toll and local exchange services in addition to equal access. NYNEX provided no new information that warrants reconsideration of this finding. Therefore, we reaffirm our initial decision.

16. Several petitioners argued that the definition of equal access is too restrictive and should be expanded to include the cost of converting all end offices. The arguments raised by the parties were also raised in comments submitted to the Joint Board. The Joint Board considered these arguments but rejected them on the basis that these costs are not appropriate for the equal access category for separations purposes. The parties have not raised any new arguments or submitted any new information that was not considered by the Joint Board and by this Commission. Therefore, we reaffirm our initial decision.

17. Finally, several petitioners seek a deferral of the implementation date for the *Decision and Order*. In an *Order* released February 21, 1986,[8] the Chief, Common Carrier Bureau deferred the implementation of the *Decision and Order* until May 1, 1986. As originally adopted, changes to the separations procedures for equal access costs would have become effective within 30 days after the publication of the *Decision and Order* in the Federal Register, on February 20, 1986. With the deferral of the effective date, the petitions seeking such deferral filed by Bell Atlantic, Southwestern, Mountain States, Northwestern Bell and Pacific Northwest are moot.

V. Ordering Clause

18. ACCORDINGLY, IT IS ORDERED that the Petitions for Reconsideration filed by BellSouth Corporation, NYNEX Corporation, The National Telephone Cooperative Association and Puerto Rico Telephone Company ARE DENIED.

19. IT IS FURTHER ORDERED, that the petitions for reconsideration filed by Bell Atlantic Corporation and Southwestern Bell Telephone Company and the petition for waiver filed by Mountain States, Northwestern Bell, and Pacific Northwestern Bell ARE DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, FCC 86-6 (released January 7, 1986). PRTC petitioned for partial reconsideration.

[2] Bell Atlantic's petition for reconsideration requests only that the effective date for implementing our January 7, 1986, Order be deferred until May 1, 1986. The State of New York's Department of Public Service opposed this delay in a letter of opposition. We have included Bell Atlantic's petition in our discussion of petitions to defer.

[3] AT&T filed an opposition to the petitions of BellSouth, NCTA, NYNEX and PRTC. BellSouth, NYNEX, PRTC and Pacific Bell and Nevada Bell (The Pacific Companies) filed reply comments.

[4] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[5] We also recently adopted accounting procedures for equal access. *Memorandum Opinion and Order*, In the Matter of Petitions for Recovery of Equal Access and Network Reconfiguration Costs, FCC 85-628 (released December 9, 1985).

[6] We have not given any weight to this argument because persons who petition for reconsideration always have the burden of demonstrating that a final decision should be modified.

[7] The *MFJ* generally requires AT&T to reimburse the BOCs for certain costs associated with implementation of equal access if the BOCs are unable to recover these costs through their tariffed rates.

[8] *Order*, CC Docket Nos. 78-72 and 80-286, 60 Fed. Reg. 2756 (February 21, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-371

In the Matter of

Exchange Network Facilities for Interstate Access

Allnet Communications Service, Inc. File No. E-83-23

v.

American Telephone and Telegraph Co.

Telesphere Network, Inc.

v.

American Telephone and Telegraph Co., et al. File No. E-83-18

U.S. Telephone Communications, Inc. File No. E-82-19

v.

American Telephone and Telegraph Co., et. al.

MEMORANDUM OPINION AND ORDER

Adopted November 4, 1986: Released November 14, 1986

By the Commission: Commissioner Dennis not participating.

Introduction

1. In its decision upholding our decision to extend the Exchange Network Facilities for Interstate Access (ENFIA) Interim Agreement,[1] *MCI Telecommunications Corp. v. FCC*, 712 F. 2d 517 (D.C. Cir. 1983), the Court remanded this case to this Commission "for the limited purpose of considering the propriety of and, if appropriate, awarding retroactive refunds and prospective relief to OCCs[2] that were victimized by system-wide discrimination found to exist in Docket No. 78-72 . . . " 712 F. 2d at 539. The Court referred to our ruling that the entire access compensation system was discriminatory in *MTS and WATS Market Structure*, (CC Docket No. 78-72, Phase I), Third Report and Order, 93 FCC 2d 243 (1983) (*Access Charge Order*). In response to a Commission notice published December 20, 1983, 48 Fed. Reg. 56272, comments and reply comments addressed to the issues raised by the Court were filed.[3]

2. The issues raised by the Court and the commenters can be evaluated only against the backdrop of dramatic change and upheaval in the telecommunications industry generated by the increasing introduction of competitive services. Novel, complex issues emerged which required extensive rethinking of economic and regulatory policies. The ENFIA Agreement and ENFIA tariff were both part of and a response to that process. We shall not attempt in this Order to describe all of the intricacies leading to final adoption of the access charge plan, or of other policy proceedings. Rather, we focus upon the relationship of ENFIA to access compensation policy and to our goal of a non-discriminatory access compensation scheme. We shall outline below the continuing interaction between the ENFIA Interim Agreement and ENFIA tariffs, the development of an access charge system, changes to separations procedures, and this Commission's long-standing efforts to prevent cross-subsidies between AT&T's message services and competitive private line services. We conclude that the OCC's were not "victimized" by the access compensation system which we found to be discriminatory in CC Docket No. 78-72. In fact, the OCCs paid less under the ENFIA tariffs than they would have paid under a comprehensive and nondiscriminatory system such as the one we prescribed in CC Docket No. 78-72.

Background

3. The Commission's decision in *Specialized Common Carrier Services* [4] opened the switched data and private line interstate markets to entry by carriers offering services in competition with AT&T. That decision was subsequently interpreted to require AT&T to provide service to the OCCs through which they could interconnect their private line circuits into the local exchange.[5]

4. In 1974, MCI Telecommunications Corporation (MCI) filed tariffs for a new service called Execunet, linking together a network of intercity private lines and local interconnections, to offer service competing with AT&T's message telephone service. The Court of Appeals' decisions in *Execunet I* and *II* [6] held that the service was within the scope of MCI's authorizations from this Commission, and that until the Commission made explicit public interest findings necessary to bar OCCs from offering such service, local telephone companies were required to interconnect with OCCs for the provision of MTS and WATS "like" services.

5. Shortly after the *Execunet* decisions, this Commission initiated *MTS and WATS Market Structure* (CC Docket No. 78-72) with a "Notice of Inquiry and Proposed Rulemaking."[7] The primary purpose of the proceeding was "to determine whether the public interest requires that interstate message toll telephone service (MTS) and wide area toll telephone service (WATS), or their functional equivalents, should be provided on a sole source basis (ie., [sic] free from direct competition)." *Id.* at 757. "A principal question" was whether we should exercise our jurisdiction under Section 201(a) of the Communications Act to establish divisions of charges for interstate services. It was our view that it was "necessary to formulate policy in this area". Therefore, we proposed "to determine what reimbursement interstate services should make to local operating companies for the use of local plant . . . what additional charges, if any should be levied on interstate services to support local exchange services; and whether and how these charges can be equitably imposed on all interstate services . . . of all carriers." *Id.* at 759.

6. The question of reimbursement by interstate services for their use of local exchange plant was not a new one for this Commission. The Supreme Court had decided in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), that because local plant is used for interstate calls, the recovery of an appropriate percentage of local plant costs should be regulated by federal rather than state authorities. Out of that decision grew the separations process and eventually the *Separations Manual*, by which local exchange plant costs are allocated between interstate and intrastate jurisdictions, permitting the FCC and the states to control recovery of the respective interstate and intrastate costs of local exchange plant. The *Separations Manual* was adopted as part of the FCC's Rules and Regulations. [8] At the time MCI filed the appeal underlying this Order, the separations process assigned approximately 26% of the costs of non-traffic sensitive local exchange plant to the interstate jurisdiction. Those costs were recovered and collected by AT&T from interstate long-distance customers. AT&T reimbursed the local telephone companies for AT&T's use of their property in completing interstate long distance telephone calls through the division of revenues and settlements procedures. AT&T allocated a share of revenues out of the interstate revenue pool to each local telephone company (both the Bell System Operating Companies and the independent telephone companies) in proportion to its share of the total investment allocated to the interstate jurisdiction by the separations process.

7. With the advent of competition in interstate MTS and WATS services, the jurisdictional separations process and settlement and division of revenues procedures no longer could provide a uniform, collectively acceptable reimbursement mechanism for the use of local telephone company exchange plant by interstate services. Neither jurisdictional separations nor settlements procedures were designed with competitive provision of interstate telephone service in mind. The *Execunet* decisions required the local telephone companies to provide interconnection to the OCCs and to recover individually from each OCC the cost of exchange plant used by the OCC in its provision of interstate service, but without any guidance regarding appropriate cost recovery.[9] Hence, this Commission decided to formulate policy establishing what reimbursement should be made and what methods should be adopted so that all interstate carriers would equitably compensate local telephone companies.

8. In response to the *Execunet* decisions, the Bell System Operating Companies (BSOCs) filed a new tariff, BSOC Tariff No. 5, to offer a new service, Exchange Network Facilities for Interstate Access (ENFIA). Prior to the Execunet litigation, the BSOCs had charged intrastate business line exchange rates to the OCCs for their use of local exchange facilities to provide interstate private line services. While the Execunet litigation was pending, the BSOCs extended the intrastate business line exchange rates to the use of local exchange facilities by the OCCs for provision of interstate MTS-WATS "like" services. "During the pendency of the EXECUNET litigation, the OCCs and their subscribers made no contribution to local plant costs allocated to the interstate jurisdiction". *National Ass' n of Regulatory Utility Commissioners v. FCC*, 737 F. 2d 1095, 1106. (DC.Cir. 1984). The BSOC 5 tariff, however, was designed to approximate the cost method of compensation provided by AT&T's MTS and WATS services to local telephone companies pursuant to *Separations Manual* procedures. It would have increased charges to the OCCs significantly over the business line exchange rates the OCCs were then paying. The OCCs opposed the proposed ENFIA tariff as unlawful, anticompetitive, and insufficiently supported, and requested rejection or suspension of the proposed tariff. This Commission did not reject, suspend or designate the BSOC 5 tariff for investigation. Instead the Bell Companies agreed to defer the proposed effective tariff date pending negotiations with the OCCs.

9. The Commission convened ENFIA negotiations in order to avoid time-consuming, duplicative exploration of the complex policy, economic and legal issues fundamental to rate making and regulation already under investigation in the *MTS and WATS Market Structure* policy proceeding.[10] We acted upon the suggestion of the National Telecommunications and Information Administration (NTIA) not only to avoid duplicative litigation, but to ensure that the local telephone companies received some compensation from OCCs for the use of exchange facilities to provide interstate services during the prolonged period anticipated to resolve the fundamental rate making and regulatory issues pending in the *MTS and WATS Market Structure* proceeding.[11]

10. The ENFIA negotiations were publicly conducted under the supervision of the Chief, Common Carrier Bureau. During the negotiations, the BSOC's advocated ENFIA rates which would fully recover interstate costs in the same manner as AT&T's MTS and WATS services did through the *Separations Manual*, while the OCCs advocated continued application of intrastate business line rates. It was the position of the OCCs that since certain services, in particular FX and CCSA services, obtained the same or similar exchange interconnection as the OCCs, but paid only local business line rates, then the OCCs should also pay only the intrastate business line rates, even though the OCCs used the local exchange facilities for the provision of MTS/WATS "like" interstate service. The compromise reached by the parties was to establish an interim formula for development of ENFIA rates patterned after jurisdictional separations methods, but with adjustments which resulted in a level of compensation to the local telephone companies lower than that made by AT&T's MTS and WATS services and higher than the intrastate business line rates. In approving the ENFIA Interim Agreement, we emphasized that the local telephone companies' former application of local business exchange rates to OCC's for MTS/WATS "like" access had failed to recover costs which are legitimately interstate. *ENFIA*, 71 FCC 2d at 445-46. (1979).

11. This Commission approved the ENFIA Interim Agreement on April 16, 1979.[12] The Agreement was limited in scope to end-to-end MTS/WATS "like" interstate services, including Execunet/SPRINT type service, and limited to a period no longer than five years.[13] The parties to the Agreement noted that other existing interstate service offerings used local telephone companies' exchange network facilities, *e. g.*, open-end Foreign Exchange (FX) and Common Controlled Switching Arrangements with off-network access lines (CCSA-ONALS), but compensated the local telephone companies on a basis different from MTS/WATS and different from the OCC's MTS/WATS "like" services. The parties urged the Commission to resolve the question of how such services (FX and CCSA) should compensate local telephone companies in an expeditious manner. The parties also agreed that "[T]he terms agreed to are without prejudice to the right of each party to take different and inconsistent positions

in any forum or proceeding. Notwithstanding the foregoing, the undersigned parties further agree that they will not attack or challenge this Interim Settlement Agreement or the lawfulness thereof, nor shall they rely upon it, in whole or in part, in any forum or proceeding other than a proceeding directed to the interpretation or enforcement of this Interim Settlement Agreement."[14]

12. The ENFIA Agreement established a formula for development of ENFIA rates that had three components or elements. Element 1 was for voice grade central office connecting facilities (VGCOCF), for which the rate was set forth in the Bell System Facilities for Other Common Carriers Tariff already on file with the FCC. Element 2 was for the traffic sensitive portion of local exchange switching and trunking facilities. It was computed to simulate the payments local exchange carriers received through settlements or division of revenues when comparable service was provided for MTS or WATS. The charge was computed as a flat rate reflecting plant costs per minute of use (MOU), less a message unit credit per month, per ENFIA line terminated. The initial rate was calculated upon an average initial monthly use of 3,240 OCC billed minutes per month per ENFIA line, which was adjusted annually to reflect a 5% yearly increase in plant costs and on the basis of subsequent OCC weighted average billed MOU of the facilities. Rate Element 3 was a payment for use of nontraffic sensitive plant and was calculated as a percentage of the amount determined under the *Separations Manual* for the same plant when used in the provision of interstate MTS and WATS service by AT&T (the separations factor or SEP Amount). This percentage discount was termed "Factor P". When total OCC revenues were $110 million or less, the OCC's were to pay 35% of the SEP Amount; when OCC revenues were more than $110 million but less than $250 million, the OCC's were to pay 45% of the SEP Amount; and when the OCC revenues were more than $250 million, the OCC's were to pay 55% of the separations amount.[15]

13. The method by which AT&T and others had compensated the local telephone companies for exchange facilities used in the provision of interstate MTS and WATS services differed from the ENFIA method in two significant respects. First, actual minutes of use, rather than billed minutes of use, were applied to AT&T. Second, the full SEP Amount was applied to AT&T, while it was discounted for ENFIA rates. The result was that the ENFIA compensation was substantially lower than the compensation AT&T paid to the local telephone companies, although there was no reason to believe the cost of providing the same exchange access service to the OCCs and to AT&T differed.[16]

14. In approving the ENFIA Agreement, we found that the discount from the *Separations Manual's* factor was reasonable because certain capabilities and functions available to AT&T were not available to the OCCs MTS/WATS "like" calls, such as channel noise characteristics, transmission of rotary pulse dialing signals, call billing, signalling, and call completion with only ten digits. 71 FCC 2d at 454. We found that the ENFIA discount (Factor P) was no less cost-supported, and in principle no more nor less cost-based, than the similar *Separations Manual* factor. Since the Manual was itself a product of federal and state regulatory policy and is part of the Commission's rules, its factor had to be accepted for the purposes of the ENFIA tariffs as "at least prima facie reasonable as a means of apportioning costs which are not specifically identifiable." *Id.* at 454, 456, n. 29. In addition, we considered the effect of sudden rate increases upon competition, and concluded that the phase-in of ENFIA Factor P as OCC revenues increased provided adequate time for the OCC's to absorb the increased payments for exchange services. *Id.* at 455. Although sound reasons existed for authorizing lower access charges to the OCCs than for AT&T's equivalent MTS/WATS services, we also found that the practice of connecting the OCCs to local exchange facilities pursuant to local business exchange tariffs could not continue because the OCCs did not make a contribution to the interstate costs of local exchange service:

> . . . .[T]he two specialized common carriers which are presently offering MTS/WATS "like" services to the public, MCI and SPCC, have been connected to local telephone companies' exchange facilities under local exchange tariffs governing business customers. Although MTS/WATS "like" calls are interstate end-to-end, and should be treated as interstate in their use of the telephone companies' exchange facilities for purposes of jurisdictional separation of the telephone companies' costs and revenue division, this has not been the case when facilities have been provided under local exchange tariffs. 71 FCC 2d at 445-6.

15. Four months after approval of the ENFIA Agreement, the Commission announced its intention to consider changes to separations procedures which might be required by the new competition in the interstate MTS and WATS markets. *MTS and WATS Market Structure*, 73 FCC 2d 222 (1979). Comments were requested on policy issues for consideration by Federal-State Joint Board concerning any changes which should be made to separations, settlements and division of revenues procedures attendant to any determination we might make of nondiscriminatory access charges. Comments to propose policy issues for appropriate treatment of FX, CCSA and other interstate services through separations, settlements and division of revenues were encouraged. *Id.*, at 234 and n. 13, and at 245.

16. After evaluating the comments in the *MTS and WATS Market Structure* inquiry, we determined that disparities in separations treatment might produce discrimination in access compensation among competing interexchange carriers, and also indirectly result in differences in end-user rates amounting to unjust or unreasonable discrimination or unreasonable prejudice. *MTS and WATS Market Structure* (Second Supplemental Notice of Inquiry and Proposed Rulemaking), 77 FCC 2d 224, 228-230 (1980). Four different mechanisms had evolved for compensating local telephone exchange operators for originating and terminating interstate services. MTS and WATS services compensated the local exchange companies through settlements or divisions of revenues based upon jurisdictional separations of interstate costs and revenues; open-end FX and CCSA through the local telephone companies' intrastate tariffs for business exchange service; MTS/WATS "like" competitive services through the interstate ENFIA rates; and private line services through settlements that were not based upon usage. Until we could determine the appropriate relationship for origination and termination of services among MTS/WATS, MTS/WATS "like", FX-CCSA open-end services, and private line services, it was impossible to prescribe just and reasonable charges for exchange access for any of these services. It was apparent that this Commission had to adopt new cost allocation procedures to apply uniformly

to all interstate services, so that interstate exchange plant costs would be allocated more closely in line with the costs of originating and terminating the various interstate services. Accordingly, we invited comments on plans to allocate interstate exchange plant costs among various AT&T and OCC services and announced plans to initiate a separate policy rulemaking to address related changes in the *Separations Manual*. *Id*., 77 FCC 2d at 230-31.

17. Soon thereafter, we found that competition in all interstate interexchange services is in the public interest and would further the goals of the Communications Act. *MTS and WATS Market Structure* (Report and Third Supplemental Notice of Inquiry), 81 FCC 2d 177, 183 (1980). We also found that competition among interexchange carriers that use the same monopoly local exchange facilities would not pose any substantial threat to the local exchange carriers "if each interexchange competitor pays comparable compensation for the use of local exchange facilities." *Id*., at 186.

18. This Commission adopted the Interim Cost Allocation Manual (ICAM) in January 1981, prescribing a method to allocate the costs of AT&T interstate services.[17] This was necessary to resolve this Commission's long-standing concerns regarding cross-subsidies from AT&T's monopoly MTS and WATS services in favor of AT&T's competitive private line services. The Commission rejected objections to the ICAM based upon contentions that the *Separations Manual*, used to determine the interstate revenue requirement to be recovered by AT&T with respect to plant jointly used by intrastate and interstate services, was either inadequate or unlawful:[18] The existing method of separating plant used jointly or in common for interstate and intrastate services . . . was adopted after a Federal-State Joint Board met on the matter and is incorporated as Part 67 of our Rules. Existing separations procedures are binding on carriers, the states, and ourselves . . . . [T]he Commission does not have the power to unilaterally modify matters affecting jurisdictional separations. Any such matter must be referred to a Federal-State Joint Board, pursuant to Section 410(c) of the Communications Act. There is virtually total agreement that the existing system of separating plant can and should be improved . . . . A Federal-State Joint Board has already been convened in Docket 80-286 and has begun the task of formulating recommendations. 84 FCC 2d at 391. When we adopted the ICAM, we also required the addition of a fourth reporting category for the ENFIA services. The four categories were MTS, WATS, Private Line Services and ENFIA. We did not require that ENFIA services be targeted to earn the authorized system rate of return, like the other three services, as long as ENFIA were provided at rates resulting from application of the Interim Agreement, because we expected the access charge proceeding to establish "appropriate levels for ENFIA access." *Id*. at 406. AT&T reported losses each year for ENFIA services. AT&T reported ENFIA return levels of -6.8% for 1980, -5.6% for 1981, -5.6% for 1982, and -6.5% for 1983.[19]

19. In April 1982, this Commission issued its order approving extension of the ENFIA Agreement into Phase II. *ENFIA* (Extension Order), 90 F.C.C. 2d 6. We determined that continuation of the Factor P discount at 45% was justified for the same reasons that the use of the Factor P discount was initially approved. Moreover, the record contained no concrete information with respect to the costs of providing equal access or the value that OCC customers would place on the ability to make MTS/WATS "like" calls of technical quality equivalent to MTS/WATS services. Id. at 10, 15. While we considered that the qualitative differences between MTS/WATS and the OCCs access justified lower access charges to the OCCs, we rejected arguments of the OCCs that their access charges should be further reduced in order to equalize their charges with those applicable to FX and CCSA: *Disparities in the access costs* that are reflected in rates for different telephone company services and the "value added"carriers *were explicitly recognized in the original ENFIA agreement*. The parties probably selected an intermediate level of payment that is lower than the MTS/WATS level and higher than the level for many other services because they recognized that *it would be impossible to e stablish parity between Execunet / SPRINT - type access and all other forms of access compensation until those disparities are eliminated though other proceedings*. We sanctioned that approach for the interim period when we approved the original agreement. We believe it is still reasonable to allow OCCs to pay charges that are lower than MTS/WATS access costs and higher than other access costs during the interim period. *That interim period will, of course, end when access charges are established pursuant to the rules we will be prescribing in CC Docket 78 - 72*. 90 FCC 2d at 6-17. (Emphasis added).

20. The extension of ENFIA rates into Phase II required a determination of reasonable rates under the terms of the Agreement. BSOC Tariff 8, proposing ENFIA rates for Phase II, raised two interpretive issues under the Agreement: the proper number of weighted average billed OCC minutes per ENFIA per month (MOUs) and the correct SEP Amount factor. We ordered an investigation to resolve those issues and also specified an interim billing and collection rate for ENFIA services of $178.46 computed pursuant to the terms of the Agreement. The billing and collection rate was ordered "subject to adjustment . . . . If the interim collections are below a just and reasonable level under the agreement, we will require the OCC's to make up the difference; if the interim collections are above the just and reasonable level, we will require AT&T to refund the difference to the OCCs." 90 FCC 2d at 215.

21. We later resolved the interpretive issues by directing AT&T to file a replacement tariff using a SEP Amount[20] no greater than $0.505, a billed minutes factor no greater than 4474, and an overall Element 2 and 3 rate no higher than $183.46. Since the billing and collection rate ordered several months earlier had been $178.46, we ordered the OCCs to remit the difference between the two rates for the five month investigation period. *ENFIA*, 91 FCC 2d 1079, 1094-95. (1982). When interpreting the terms of the ENFIA Agreement, we not only attempted to give effect to the intent of the parties and to preserve the "rough justice" compromise reached by the parties, but also "to satisfy our public interest responsibilities . . . to resolve the parties' conflicts in a way that did not 'fatally curtail' competition in interstate MTS/WATS-type services before the substantial changes occasioned by a shift to access charges and the divestiture of the Bell Operating Companies are put in place. We found that, in order to establish a rate that satisfied these objectives, certain adjustments to the billed minutes and SEP Amount figures provided by the parties were required." *ENFIA* (Reconsideration, 93 FCC 2d 739, 743 (1983).

22. Resolution of the Phase II ENFIA issues and determination of reasonable rates, just as approval of the ENFIA Agreement, involved not only considerations of competitive impact, but avoidance of creating subsidies

from other ratepayers to ENFIA services. Balancing these public interest objectives required the exercise of judgment. Determining the reasonableness of rates for a service in which the underlying costs cannot be precisely quantified depends upon the inherently judgmental nature of separations and allocating jointly used plant[21] –in this case local telephone company exchange facilities:

> The policy served by the agreement and tariff is the assurance of continued interconnection of competitively provided MTS/WATS-type services with exchange facilities for reasonable compensation to local telephone companies . . . . |T|he structure of the ENFIA tariff was forged by agreement between AT&T and the OCCs in response to the need to implement the Commission's interconnection policies despite substantial uncertainty as to the proper measure of the costs of interconnection for OCC MTS/WATS-type services . . . . Thus, ENFIA is inherently a temporary measure, intended to provide a means of approximating costs that cannot be known with precision until a more permanent access charge system can be put in place. By its very nature, ENFIA cannot be held to the same cost-based standards as conventional carrier-initiated tariffs. Yet, the lack of "mathematical nicety" does not detract from its usefulness in ensuring interconnection at reasonable rates, as required under Section 201 of the Act . . . . |T]he ENFIA agreement remained our best means of fulfilling this statutory responsibility . . . .
>
> Our public interest concerns also differ somewhat in this case . . . Because of the peculiar circumstances that surround the ENFIA rates, we believe that our statutory responsibility to ensure its reasonableness as an interim measure includes the task of making sure that consumers of AT&T and OCC services are not indirectly disadvantaged through either the demise of competitive alternatives as a result of ENFIA rates that are too high or the placement of unreasonable burdens on other services if ENFIA rates are too low." 93 FCC 2d at 758-60.

23. Settlement of the government's antitrust suit against AT&T raised further questions regarding local exchange access compensation. We released our "Fourth Supplemental Notice of Inquiry and Proposed Rulemaking" in *MTS and WATS Market Structure*, seeking comment. 90 FCC 2d 135 (1982). The modified consent decree required that the BOCs would eventually provide all interexchange carriers with access to exchange facilities equal in type and quality and price to that provided to AT&T. Until equal access was available, value of service discounts were permitted.[22] Access service tariffs were to become effective on the date of divestiture and replace the division of revenues process. Among the issues we specified for comment was the question of how an access charge system should take into account the difference in interconnection quality received by the OCCs and AT&T, and whether a discount similar to the ENFIA Factor P should be applied to non-traffic sensitive costs for inferior quality interconnection. *Id.* at 136.

24. In a declaratory ruling that ENFIA tariff rates applied to resellers, we reminded the parties that:

> [D]ifferences in treatment that currently exist between MTS/WATS-equivalent services subject to ENFIA and certain interstate services for which users pay only local business rates for connection to local facilities . . . . [resulted from the] consistent practice under the Separations Manual . . . to assign the minutes of use of the "open-end" of FX service and CCSA/ONAL service to the intrastate jurisdiction. In contrast, the minutes of use of the exchange plant associated with MTS/WATS equivalent service – as in the case of MTS/WATS itself – have been treated as interstate . . . We anticipate that any anomaly caused by this disparate treatment will be eliminated when the appropriate changes have been made to separations procedures by the Federal-State Joint Board in CC Docket No. 80-286, and a comprehensive access charge plan is in place.[23]

25. In the "Third Report and Order" of *MTS and WATS Market Structure* we adopted an access charge system to compensate telephone companies for the use of their exchange facilities by interstate services.[24]

The plan did not specify exact charges, but established the methodology carriers must follow in order to compute access charges. We found that the existing discriminatory access compensation arrangements were the result of a changing environment:

> Neither the carriers nor the regulators viewed access service as a distinct service before this Commission ordered the telephone companies to provide access service to the new "specialized" carriers. The pre-existing access service compensation arrangements were by-products of managerial or regulatory decisions that were made for some purpose other than fixing access service compensation. Access service compensation for the new carriers *could not* be fixed in a manner that established parity with each of the preexisting services offered by the telephone companies or the old "other"carriers. *Id.* at 257. (Emphasis added.)

The result was that open-end FX/CCSA services paid local exchange service rates for open-end access, the MTS/WATS equivalent services paid the higher ENFIA rates, and MTS and WATS paid even higher access compensation through the settlements and divisions of revenues process, even though all were like services with no demonstrable cost differences. *Id.* at 258. This Commission had attempted over many years to eliminate unreasonable discrimination among AT&T's private line, WATS, and MTS services through adoption of FDC cost methodology and development of a cost allocation manual for AT&T. That goal could not be achieved under the existing access compensation system, and was one factor in this Commission's final access system plan:

> |I]t is virtually impossible to eliminate discrimination among [AT&T] services while maintaining the current MTS/WATS structure and encouraging cost-based rates for other services . . . . |T]he costs associated with the non-traffic sensitive plant used to provide these services must ultimately be recovered through charges based on the same rate structure. *Id.* at 273.

26. Because in the short run the superior quality access received by AT&T could be provided to only one carrier, we imposed a charge upon AT&T and its interexchange partners that would reflect an estimate of premium value, called the premium access charge. The access compensation disparity between MTS and FX services was a major factor in extending the ENFIA agreement without altering the Element 3 discount (Factor P) at 45%. We found, however, that since the access charge rules eliminated the

disparity between MTS and FX, the remaining justification for the ENFIA discount, the inferior quality of interconnection provided to the OCCs, could not support a premium as large as that represented by the former ENFIA discount. *Id.* at 286-89. We had invited proponents of a large or small differential in the access compensation paid by the OCCs and by AT&T, in both CC Docket No. 78-72 and in the ENFIA proceeding, to submit a case for a particular differential. However, the participants were "unable to produce submissions that have much evidentiary value." *Id.* at 288.

27. We required carriers to compute revenue requirements for interstate access services pursuant to the Commission's prescribed rules for separation of investment and expenses between the interstate and intrastate jurisdiction, contained in the *Separations Manual* and incorporated as Part 67 of our Rules. *Id.* at 316-17. We anticipated that the Joint Board proposal, to treat investment, expenses and revenues attributable to interstate FX and CCSA open-end access services as interstate costs and revenues, would be implemented in time for the replacement of intrastate tariffs with interstate access charge tariffs for FX and CCSA, as required by the adoption of the access rules. *Id.* at 297-98. Additionally, our access charge rules created new allocation rules for segregating access investment and expenses from other interstate costs, and procedures for apportioning access investment and expense among access elements. *Id.* at 318-25.

28. The *Access Charge Order* was part of a regulatory overhaul of policy necessitated by the end of monopoly interstate services:

> The monopoly telecommunications environment of the past has ended. The approaches taken in the past to balance the four goals of universal service, non-discrimination, cost-based prices and a viable, efficient telecommunications network -- goals which we believe have been the aim of the Communications Act since its passage -- are no longer appropriate. The past approaches have essentially been nothing more than the development of special, discriminatory rates for different customers making identical use of access plant in interstate service. It is readily apparent that in an era of facilities-based competition and resale such approaches are not viable. *Id.* at 339.

29. In the First Reconsideration of our *Access Charge Order*, we replaced the separate premium rate element for AT&T's superior interconnection with factors to be applied to the minutes of non-premium usage in order to compute the differential. We set the differential at 35% by ordering a factor of .65 to be applied to OCC access minutes for assessing the per minute Carrier Common Line charge in 1984, and required that the differential be phased out at the same rate at which equal interconnection is provided. *MTS and WATS Market Structure*, 97 FCC 2d 682, 725, 729 (1983).

30. In February 1984 this Commission adopted the Joint Board Recommendations in CC Docket No. 80-286 to establish new procedures to allocate non-traffic sensitive and traffic sensitive local exchange plant costs between the interstate and intrastate jurisdictions, as well as other changes in the *Separations Manual*. Among the adopted revisions to the *Manual* were (1) the recognition of usage of local exchange plant by competitive message services provided by interexchange carriers other than AT&T, *e. g.*, ENFIA type services, and (2) allocation of all traffic sensitive plant costs and revenues attributable to interstate FX/CCSA-ONALS open-end access services to the interstate jurisdiction, to be effective upon the effective date of access charge tariffs.[25]

31. We further revised the treatment of nonpremium OCC access in the Second Reconsideration of the *Access Charge Order*. We were convinced by the further petitions for reconsideration that although it is impossible to determine a precise premium value, our original estimate was neither precise nor sufficiently large. A discount factor of 45% had been used to compute the ENFIA Element 3 charge for the use of non-traffic sensitive exchange facilities. In our First Reconsideration of the *Access Charge Order*, we had ordered a 35% differential. Upon further reconsideration, we established an initial differential of about three-fourths of the then-existing ENFIA differential, in order to avoid an abrupt change from the then-current ENFIA rates. Since the existing total ENFIA differential for all relevant access was about 70%, the initial access differential was set at 55%. We also converted the per-minute charge for unequal access to a charge per-line, in order to avoid a very abrupt increase in access costs to those OCC's who had usage per-line that substantially exceeded the industry average. The ENFIA tariffs had always used per-line charges for all elements. We also selected a 9,000 minute per-line factor for computing the initial monthly per-line charge, based upon an estimate of average OCC usage per-line derived from data provided by the OCCs for the 1983 recalculation of ENFIA minutes. 97 FCC 2d 834, 860-62 (1984). In addition, we devised a non-premium rate for FX/CCSA open-end access to apply to lines that terminate in end office switches without equal access capability, in order to maintain parity between FX/CCSA customers and customers of MTS/WATS equivalent services that use identical interconnections. *Id.* at 864.

32. Finally, we rejected further petitions for reconsideration which requested that initial access charges for open-end FX be established at a level lower than for MTS/WATS equivalent services:

> The rules that we adopted in the *Access Charge Order* were designed in part to remedy the longstanding discrimination between rates charged FX and MTS users, thus satisfying one of the central purposes of this proceeding. As early as the Second Supplemental Notice we presented a plan to establish parity between FX and MTS rates. 77 FCC 2d 224 . The *Access Charge Order* achieved this parity in a way that differed somewhat from . . . the Second Supplemental Notice . . . Petitioners have not demonstrated that FX charges that are lower than OCC charges would be warranted. 97 FCC 2d at 865.

33. This Commission's *Access Charge Order* was affirmed in all pertinent respects *per curiam*.[26] The Court approved our accommodation of four competing goals: continued assurance of universal service, the elimination of unjust discrimination or unlawful preferential rates, the encouragement of network efficiency and the prevention of uneconomic bypass. 737 F. 2d at 1108. The Court also upheld the method chosen to require all telephone subscribers to pay, on a per-line basis, for some portion of their necessarily incurred local telephone plant costs assigned to the interstate jurisdiction by the separations process. *Id.* at 1115. The Court noted that the introduction of competition in interstate long distance service made the recovery of telephone equipment costs a controversial matter, formerly adequately addressed by the

separations process and settlement and division of revenues procedures. *Id.* at 1103-05. The Commission did not require, prior to the access charge decision, that FX users contribute to the local plant costs allocated to the interstate jurisdiction, or that private line service users contribute in the same manner that ordinary long-distance callers do, to local plant costs allocated to the interstate jurisdiction. *Id.* at 1105-6.

> Under the old regime . . . FX users paid only the cost of a local business line and made no contribution for access to the "foreign exchange" similar to that assessed users of MTS/WATS or equivalent OCC-provided long distance services. FX users enjoyed a uniquely privileged spot in the rate structure . . . .
>
> [T]he FCC, as one of its ultimate goals, projected a single-tier rate structure within which all providers of interstate service would pay the same carrier access charges. As a way station . . . the FCC established a two-tier system that recognized the reality of premium access enjoyed by some carriers, primarily AT&T. *Id.* at 1144.

34. The Court approved of the Commission's correction of disparities in exchange access rates through the imposition of the usage-based carrier common line charge and the private line surcharge, both based upon relative use, by imposing a single neutral, reasonable principle which yields no essential difference in the per-minute rate charged:

> The Commission has, to the best of its ability, attempted to reconcile existing disparities in charges levied against interexchange carriers and private line users. Its plan to recover specified access costs through a combination of usage-based carrier common line charges and private line surcharges is appropriately tailored to minimize the difficulties inherent in any transition to a new system of rates; it is designed to guarantee the widest possible participation among all classes of exchange access users; and it is neutrally imposed on the basis of relative use. Certainly, therefore, this plan falls within the broad zone of expertise and discretion which must be granted to the Commission in a proceeding which touches the very core of the rapidly developing telecommunications industry. *Id.* at 1138.

Issues on Remand

35. The Court of Appeals directed this Commission to consider on remand the propriety of retrospective and prospective relief to OCCs who might have been "victimized" by the discrimination found to exist in CC Docket No. 78-72, *MTS and WATS Market Strucure. MCI Telecommunications Corp. v. F. C. C.*, 712 F. 2d at 539. This Commission's *Access Charge Order* was affirmed later on appeal and held to cure and to eliminate prospectively the discrimination formerly existing among the various access services. *NARUC v. FCC*, 737 F. 2d at 1132-1138. Since prospective relief has already been ordered, and has been implemented by the institution of our access charge system devised in CC Docket No. 78-72, we need resolve here only the question of retrospective relief.

36. The Court of Appeals noted that the Third Report and Order of the *MTS and WATS Market Structure* rulemaking found the entire former access compensation scheme discriminatory, but did not make specific findings concerning the extent to which any of the petitioners in the ENFIA extension case had been "victimized" by that discrimination. "[N]ow that those interim rates [ENFIA] have been found to be part and parcel of an unlawfully discriminatory rate structure, the Commission is obligated to consider whether the petitioners are entitled to retroactive relief. That determination, moreover, must be made on remand in this case, and may not be relegated to independent complaint proceedings." 712 F. 2d at 536.

37. The Court cited the complaint provisions, §§ 206 and 209 of the Communications Act, in holding that the petitioners before the Court were entitled to a determination of whether retroactive relief is required. However, when phrasing the issue for remand the Court ordered consideration of the propriety of "refunds," a term that is generally used to describe relief that may be provided in proceedings pursuant to § 204. Several commenters disputed whether the Court required consideration of the propriety of refunds to all OCCs who paid ENFIA tariff rates, or only disposition of any formal complaints for damages concerning the ENFIA rates. We believe the import and sense of the Court's remand order included the broad question of retrospective relief, including the question of whether refunds or damages are appropriate or required. Moreover, of the formal complaints before us, one asks for refunds and the others for damages. We are obligated by the Court's order to consider whether relief is appropriate, regardless of how the pleadings were styled.

38. In view of the Court's order to determine in this proceeding, and not by independent complaint proceedings, whether any petitioners in the ENFIA appeal were victimized by the ENFIA rates, we have consolidated the three formal complaints filed by U.S. Telephone Communications, Inc., Telesphere Network, Inc., and Allnet Communications Service, Inc. for disposition herein.[27]

39. On July 27, 1982, U.S. Telephone Communications, Inc. (U.S. TEL) filed a formal complaint against AT&T with this Commission, FCC File No. E-82-19, complaining that AT&T had violated Section 202(a) of the Communications Act by providing access to AT&T of a qualilty superior to access provided to U.S. TEL, and by charging ENFIA rates for local exchange access to U.S. TEL while other customers receiving identical access paid less, *i.e.*, FX customers paid the local business exchange rate. U.S. TEL argued that it should not be required to pay ENFIA rates because it was a reseller, and thus functionally different from specialized carriers such as MCI.[28]

40. On June 7, 1983, Telesphere Network, Inc. (TNI) filed a formal complaint against AT&T and the BOCs repeating the same charges of discrimination as made by U.S. TEL, and incorporating the U.S.TEL complaint.[29] FCC File No. E-83-18.

41. On August 26, 1983, Allnet Communications Service, Inc. (Allnet) filed a formal complaint against AT&T and the BOCs. Allnet requested a forfeiture, a cease and desist order, and damages for violations of Section 202(a) of the Communications Act. FCC File No. E-83-23. Allnet was a reseller of long-distance telephone service and paid ENFIA rates for access to local exchange facilities. The Ameritech Operating Companies filed a "Cross-Complaint" requesting damages of $5,336,415 for underpayment of just and reasonable ENFIA rates by Allnet, in the event that retroactive adjustment of the ENFIA rates were found permissible.[30]

Summary of Comments

42. The basic position of the local telephone companies is that they have no liability for the discrimination found in CC Docket No. 78-72 because the discriminatory access compensation system arose from Commission- prescribed separations procedures, and because the OCCs actually paid lower rates during the ENFIA period than they would have paid under a nondiscriminatory compensation system. The basic position of the OCCs is that the FCC found the ENFIA rates discriminatory, and thus damages or refunds must be awarded. Moreover, they claim that the telephone companies had the power to cure the discrimination between access charges for FX/CCSA services and competitive WATS/MTS - "like" services, despite differing separations treatment of FX/CCSA and ENFIA access. In supporting their positions and in addressing themselves to the Court's remand order, the commenters raised numerous subsidiary issues, which we outline below.

43. Several OCCs contend that this Commission explicitly held the ENFIA rates to be unlawful, and thus the Commission has no discretion to refrain from ordering refunds or damages. MCI argues that this Commission found the ENFIA Agreement just and reasonable, but did not address the rates. MCI asserts that the record in CC Docket No. 78-72 is adequate to support a finding of unlawful discrimination. Several telephone companies argue that the Commission's *Access Charge Order* found the entire access compensation system and the relationship among MTS/WATS, ENFIA, private line, FX/CCSA and other access services to be discriminatory and unlawful. They observe that we did not find the ENFIA rates for OCC access discriminatory or discriminatorily high or low in relation to access compensation methods for any other service. AT&T contends that the Commission explicitly found the ENFIA rates reasonable and not unjustly discriminatory. The United States Telephone Association (USTA) comments that the Court remanded on the assumption that the Commission had found the ENFIA rates discriminatory against the OCCs.[31] AT&T states that the Court's remand to the Commission was for the purpose of determining whether the ENFIA rates were beneficial or harmful to the OCCs.

44. The OCCs take the position that they were harmed by the favorable discriminatory access treatment given to FX/CCSA and other services because the ENFIA rates paid by the OCCs were higher for functionally and qualitatively equivalent interstate access to the local exchange. The telephone companies reply that the question of discriminatory treatment must take into account the fact that access facilities for three service categories (MTS/WATS, the OCC MTS/WATS-"like" services, and FX-CCSA) were all functionally equivalent but that compensation methods and levels for all three differed as a result of differing separations treatment of jointly used local exchange plant by the three service categories. AT&T argues that to determine whether the ENFIA rates were too high or low, it is necessary to consider the higher rates for OCC services prescribed in CC Docket No. 78-72.

45. The local telephone companies argue that the *MTS / WATS Market Structure* inquiry, CC Docket No. 78-72, was intended to restructure the existing access compensation system and underlying Commission policy, not to pass judgement upon any particular rate resulting from past policies, and was intended to have a prospective effect only. Moreover, they note that this Commission has discretion to make a finding of unlawfulness as to the present basis for access compensation in order to prescribe changes in policy, and did not make findings as to past lawfulness or unlawfulness. The telephone companies conclude that since the lawfulness of ENFIA rates and the propriety of damages or refunds was not designated, and since no notice of such issues was given, the record in CC Docket No. 78-72 is neither adequate to make a finding of the past lawfulness of the ENFIA tariff, nor sufficient to support retroactive relief.

46. The local telephone companies also contend that the Commission has discretion to refrain from ordering refunds, depending upon whether it would be equitable under all the circumstances, even if the Commission were to find that the ENFIA rates were unlawful. The OCCs respond that once a finding of a violation is made, the Commission has no discretion, but must award refunds or damages.

47. The local telephone companies contend that interim rates such as ENFIA are not subject to retroactive adjustment unless they are "freely filed" carrier-initiated rates, and that the ENFIA rates were Commission - approved or prescribed. Moreover, the telephone companies generally characterize the ENFIA rates as intercarrier contract rates which cannot be adjusted by the Commission absent compelling public interest considerations. Ameritech states that the ENFIA rates were not an ordinary intercarrier contract, were not prescribed, and were not conventional carrier-initiated rates. The OCCs claim that any interim rates are not a valid exercise of Commission discretion without provision for retroactive adjustment, and that in any case the ENFIA rates were carrier-initiated and not FCC-prescribed. MCI argues that unlawfully discriminatory rates are not made unassailable by inclusion in an intercarrier contract.

48. The local telephone companies protest that refunds to the OCCs would be inequitable and unjust because the OCCs have already benefitted as a result of subsidies gained to the detriment of the telephone companies. This benefit arose from the ENFIA discounts relative to equivalent MTS/WATS access services, and the detriment from the fact that the local telephone companies earned negative returns on ENFIA services. Accordingly, the local telephone companies postulate that an order to make refunds to the OCCs would constitute an unjust enrichment to the OCCs and a confiscation of telephone company property without due process. Additionally, they argue that any refund to the OCCs would be a windfall because the OCCs earned an adequate return during the period of effective ENFIA rates and because there is no guarantee that refunds would be passed on to the ultimate users, the OCCs' customers. In reply, Allnet states that the OCCs received no benefit because of the inferior quality of interconnection received. Allnet claims that the telephone companies earned compensatory returns from ENFIA services, and claims that in a challenge to the BOC ENFIA Tariff 10, Allnet demonstrated that AT&T had inflated the costs of ENFIA service.

49. The local telephone companies argue that in order to support a refund order, this Commission must find that a nondiscriminatory, just and reasonable rate for ENFIA would have been less than the tariffed ENFIA rate. They maintain that lawful ENFIA rates should be determined by reference to the rates for OCC interstate exchange access prescribed by our *Access Charge Order* in CC Docket No. 78-72. The commenters do not disagree that CC Docket No. 78-72 resulted in significant rate increases to the OCCs for interstate exchange access. MCI

objects that the *Access Charge Order* rates cannot be used retrospectively because of inflation and changed total interstate revenue requirements.

50. The local telephone companies question the propriety of any refunds to the OCCs because the OCCs' request for refunds, based on the intrastate exchange rates for FX/CCSA services, presumes that the OCCs had no obligation to make a contribution to the interstate revenue requirements imposed by the OCCs on local exchange operators. The telephone companies note that the ENFIA Agreement was patterned after the separations process in order to assign interstate exchange costs to ENFIA services, and in a manner similar to that already applied to AT&T's MTS/WATS service. The OCCs contend that the FX local exchange business rate can be presumed to have been the just and reasonable rate, and that the measure of refunds to the OCCs should be the difference between local business exchange rates and ENFIA rates.

51. Ameritech contends that if any relief is ordered for unlawfully discriminatory ENFIA rates, the OCCs should pay exchange operators the difference between ENFIA rates and the just and reasonable rate, or the MTS/WATS contribution to interstate exchange access. Ameritech asks for $69.6 million and "The Telephone Companies"[32] ask for $348 million. Allnet objects that the Court explicitly limited consideration of relief to the OCCs. MCI and Lexitel argue that since the ENFIA rates were charged pursuant to a tariff, Section 203 of the Communications Act forbids the carriers to retroactively collect any more than the tariffed rate for ENFIA service.

52. MCI claims that the appropriate remedy for discriminatory rates is damages and that the Court's use of the word "refund" was merely generic. MCI asserts that once a violation of the Communications Act is found, the Commission has no discretion in the matter but must award damages. MCI states that although its "Complaint," File No. E-81-37, did not allege or ask for damages, and was not directed at a tariff, it is obvious that MCI sought adjudication of whether the BOCs charged unlawfully discriminatory rates. MCI, however, contends that it was the FX/CCSA-ONALS rates which were unlawfully discriminatory against ENFIA users.

53. The telephone companies argue that once discrimination is proven, a complaint must also show actual damages with reasonable certainty. The measure of damages is not the difference between the lawful and unlawful rate, but how much worse off the discriminatee is, *e. g.*, lost profits. LEXITEL states that its damages are profits lost because its resources went to pay unlawfully high rates rather than into investment for service to customers. Allnet asserts that any refunds ordered can be used as the measure of damages in a complaint proceeding. MCI takes the position that competitive injury may be inferred from unlawful discrimination without direct proof, but does not offer a measure of damages or make a request for any amount of damages.

54. The telephone companies assert that Paragraph 3 of the ENFIA Agreement[33] constitutes an express waiver by the OCC signatories of any right to seek refunds or damages. Moreover, to permit refunds or damages to nonsignatories, but not to signatories, would result in unlawful discrimination. Allnet responds that the signatories merely waived their rights pursuant to a contract, and that refunds to nonsignatories would not constitute a discriminatory order by the Commission. Mountain States Telephone contends that the purpose of settlements, to avoid costly litigation and to finally resolve the issues, would be defeated by permitting a party to a settlement to later challenge the disputed rate. Mountain States objects that if refunds were awarded to the ENFIA signatories, telephone companies would have no incentive to negotiate or settle future rates. The Telephone Companies claim that nonsignatories waived any rights to relief because they had an implied-in-fact contract with exchange operators for service at a reasonable price. Lexitel asserts that whether the signatories waived any rights to seek refunds is a question of fact. Lexitel claims that the signatory OCCs had no bargaining power and were forced to assent to the terms of the ENFIA Agreement, and thus that the waiver provision is invalid.

55. MCI disputes claims that the signatory OCCs made either an express or implied waiver of any right to challenge the lawfulness of the ENFIA rates. MCI argues that paragraph 3 did not bar signatories from arguing their position in other proceedings, *i.e.*, CC Docket No. 78-72. Further, the parties did not intend a waiver, as evidenced by AT&T's counterclaim in the federal antitrust suit. AT&T responds that in its counterclaim, AT&T argued that a challenge to ENFIA rates by signatories was not permissible under the ENFIA Agreement, but that if MCI were permitted to disregard this waiver in pursuit of antitrust remedies, then AT&T should be permitted to demonstrate that in fact ENFIA rates for service were less than the cost of providing service. Next, MCI argues that if Paragraph 3 were interpreted to constitute a waiver by the OCC signatories, the terms of the Interim Agreement are effective only during its life, which has ended. MCI believes that if Paragraph 3 were interpreted as a waiver, MCI would be penalized for having developed competitive services, and that future rate negotiations and settlements would be discouraged. MCI states that it was misled by this Commission into believing that equalization of access rates for FX-CCSA services with ENFIA rates would be accomplished promptly, and that MCI relied on such representations in assenting to the terms of the ENFIA Agreement. Further, MCI denies that its request for relief contravenes Paragraph 3 because MCI is challenging the lawfulness of access rates for FX-CCSA rates, not the lawfulness of ENFIA rates. MCI also argues that the Phase II ENFIA rates were established by this Commission and not by the ENFIA Agreement, and thus MCI is free to challenge the Phase II ENFIA rates. Finally, MCI proposes that Paragraph 3 is unenforceable because it is akin to a contract to suppress evidence. AT&T replies that parties to a settlement agreement way waive their rights if the waiver does not produce independent harm to the public interest.

56. MCI and several OCCs request further proceedings to determine the amount of refunds, as do The Telephone Companies. Western Union states that since the Court forbade individual complaint proceedings, the individual OCCs need not file complaints. Lexitel and SBS request further hearings to resolve all complaints and the opportunity for each carrier to present its individual claim to an Administrative Law Judge. The Association of Long Distance Telephone Companies (ALTEL) suggests that the telephone companies should supply the names of all OCC ENFIA customers and the necessary data regarding local business rates, so that damages may be computed. Finally, US Telephone, Inc. contends that the remand order of the Court gave no authority for the Commission to hold a "generic" proceeding to consider the question of retroactive relief to the OCCs.

Discussion

57. As the Court of Appeals directed, we have considered whether the signatories to the ENFIA Agreement waived any rights to retroactive compensation for paying access rates higher than some other customers of the former Bell System. We find that the signatory OCCs did waive any such rights. Moreover, as explained below, we find that given all the circumstances surrounding the adoption of ENFIA rates and the inadequacies of the entire access compensation system while ENFIA was in effect, it would not be just to order compensation to either the ENFIA signatories or to the non-signatory OCCs. This is true whether this proceeding is characterized as involving the award of damages or of refunds.

58. As explained below, we find that the OCCs were not "victimized" by the ENFIA tariffs. Our findings in CC Docket No. 78-72 show that, if anything, the OCCs paid too little rather than too much for access under the ENFIA tariff. In addition, even if AT&T had been responsible for the discrimination existing in the access compensation system prior to our *Access Charge Order*, AT&T was in no position to take unilateral action to reconcile the inconsistent access compensation arrangements while the ENFIA tariff was in effect, especially in light of Commission and Congressional initiatives in that area. Indeed, AT&T was precluded by the terms and nature of the ENFIA Agreement from unilaterally changing the ENFIA rates. Finally, we note that even assuming arguendo that the OCCs were in some way entitled to compensation for paying ENFIA rates, no party has provided us with information adequate to permit calculation of an award.

59. This Commission found the entire access compensation system, that is, the relationship among exchange access compensation methods for interstate MTS services, WATS services, OCC MTS/WATS-"like" services, FX-CCSA/ONALS open-end services and private line services to be unlawfully discriminatory and presently unlawful.[34] We prescribed a uniform, neutral system of access compensation and cost allocation for exchange plant to be applied in the future.[35] We did not address or designate for hearing any issue of past lawfulness of ENFIA or any other access compensation arrangement in CC Docket No. 78-72. Our purpose in that proceeding was to overhaul practices which had produced differing and discriminatory access compensation methods for MTS, WATS, FX-CCSA/ONALS, the OCC MTS/WATS-"like" services, and private line services.[36] Thus we undertook revisions in separations rules[37] and changes to interservice cost allocation methods[38] in order to facilitate the elimination of a discriminatory access system.

60. The award of relief for past excessive charges involves the determination of matters that are essentially different from those involved in prescribing rates for the future. The first is in the nature of adjudication, and the second rulemaking. Although both can sometimes be addressed, there is no legal requirement to do so.[39] For example, there are cases in which a rate, reasonable when made, becomes unreasonable as the result of changed conditions, such that although new rates for the future are necessary, no relief for past rates would be justified.[40] Or, if a notice and comment rulemaking holds that current policies are unlawful and finds that new policy must be formulated, then it may be unfair to apply that new policy retroactively by making findings of unlawfulness as to past conduct.[41] It was well within our discretion to proceed by rulemaking rather than by adjudication in addressing the lawfulness of the access compensation scheme,[42] especially since the finding of unlawfulness provided the basis for formulation of new policy, and since the discriminatory compensation system could not be corrected without a comprehensive revision of the rate structure for all interstate services.

61. Early in the *MTS and WATS Market Structure* inquiry we concluded that discrimination in ENFIA access compensation was unavoidable because of the disparate separations treatment of MTS/WATS and FX services.[43] We also concluded that no ENFIA rate could remove that disparity.[44] Since the cost of providing exchange access to all three services did not differ,[45] any ENFIA rate would have been part of a discriminatory access system, whether the ENFIA rate were the same as MTS/WATS access compensation or FX access compensation or different from both. Open-end FX-CCSA services made no contribution to interstate exchange costs before adoption of our access charge plan and during the life of the ENFIA Tariff.[46] We made a policy decision to allow continuation of the "anomalous situation" of permitting FX and CCSA access for interstate services to be classified as exchange minutes of use for FX and CCSA access, or as intrastate minutes for separations purposes, until the FX/CCSA situation could be fully resolved through Separations Manual revisions.[47] Later we asserted jurisdiction over interstate FX-CCSA services upon adoption of our *Access Charge Order* and the simultaneous prescription of separations procedures for FX-open end services.[48]

62. This Commission already had explicitly committed itself to resolving the central MTS/WATS versus FX-CCSA discrimination in CC Docket No. 78-72. However, we were faced with the immediate problem of resolving the dispute between the telephone companies and the OCCs regarding reasonable ENFIA rates expeditiously, before the major effort required to fashion new separations procedures and a new access compensation system could be completed. In approving the ENFIA Agreement, we balanced the competing public interest concerns of protecting nascent competition in the MTS/WATS market and of preventing subsidies from other telephone company services to the OCCs.[49] We concluded that the OCCs should make a contribution to the interstate revenue requirement created by their use of local exchange facilities in the provision of interstate MTS/WATS "like" services, contrary to previous practice.[50] We approved the ENFIA Agreement because it achieved a "rough justice" compromise between these competing public interest concerns, and because it established a formula for ENFIA rates patterned after the same access compensation procedures applicable to traditional MTS/WATS services, discounted to reflect the inferior quality of service provided to the OCCs and to avoid sudden large rate increases for the OCCs.[51]

63. Commenters do not attack the reasonableness of the ENFIA formula and Agreement in allocating interstate exchange costs to OCC provided MTS/WATS "like" services, a cost allocation formula patterned after jurisdictional separations procedures for MTS/WATS services. Nor do any commenters suggest that new information or new considerations make our prior approval of the ENFIA Agreement unreasonable. Indeed, any challenge to the reasonableness of the ENFIA procedures for allocating costs would be exceedingly difficult to sustain. No commenter in either the *ENFIA* proceeding or the *MTS and WATS Market Structure* inquiry provided useful information as to actual costs of various access services,[52]

and indeed could not. Questions of cost allocation are not matters of mere quantification, or mathematical nicety, but in fact are complex questions of judgment involving noneconomic concerns such as fairness,[53] and specifically so in regard to the proper allocation of interstate exchange costs to ENFIA services.[54] In the absence of any alternative reasonable ENFIA formula or rates, we cannot find the ENFIA Agreement or rates to have been unlawfully unjust or unreasonable.

64. The OCCs' refund claims appear to be based in part upon the assumption that AT&T could have taken some action on its own initiative during the period that ENFIA rates were in effect that would have eliminated discrimination or preferences among FX-CCSA, Execunet-type and MTS/WATS services. Refunds to OCCs would serve as a penalty for failing to take such action. We note, however, that the formula this Commission ultimately adopted to eliminate the discrimination required increases in access compensation for both FX-CCSA and Execunet-type services that exceeded the ENFIA rates. Additionally, the ENFIA agreement, by binding AT&T to a formula for ENFIA rates, precluded unilateral action by AT&T to resolve the discrimination problem.

65. Moreover, this Commission also concluded during the course of the *MTS and WATS Market Structure* inquiry that discrimination and preferences cannot be cured by focusing solely upon relationships among MTS, Execunet-type and FX-CCSA services. Disparities among access compensation for AT&T's MTS, WATS and private line services had a far greater impact upon end users generally. We concluded that any system of access charges must be comprehensive enough to solve the larger and more fundamental problem. Although this Commission never expressly prohibited AT&T from attempting to implement a comprehensive solution of its own to eliminate pervasive discrimination or preferences from the entire rate structure, all of the participants recognized that this Commission or the Congress would have to make the basic policy decisions that were required. In these circumstances, it would be inequitable to penalize AT&T or its telephone company partners for waiting for guidance.

66. Assuming arguendo that AT&T might be subject to some liability for the discrimination, there is no reason to believe that the OCCs would have enjoyed greater success if AT&T had eliminated the discrimination between MTS and FX before the OCCs entered the market. No OCC would ever have enjoyed the benefit of a local exchange service rate for interstate access if the FX access rate had been increased to a non-discriminatory level before MCI introduced its Execunet service. OCC entry into the MTS-WATS market might have failed if the OCCs had not enjoyed the benefits of the underpriced FX access rate from 1974 to 1979. The OCCs were beneficiaries rather than victims of discrimination during the pre-ENFIA period.

67. The OCCs conceivably might have achieved larger revenues and profits during the 1979 to 1984 ENFIA period if AT&T had raised rates for FX and CCSA customers to achieve parity with MTS without simultaneously raising the ENFIA rates. Some FX or CCSA customers might have elected to use OCC services as an alternative to MTS or WATS under those circumstances. It seems unlikely, however, that this Commission would have allowed the OCCs to continue to pay the ENFIA agreement rates under such circumstances. When the FX-CCSA access rate ceased to be a factor in the choice of a discount for non-premium access, this Commission replaced an effective discount of 70% with a 55% discount. Such an increase in ENFIA rates presumably would have offset any benefit that the OCCs might have gained from the elimination of preferences for FX and CCSA customers. The OCCs already have been compensated for the effects of those preferences in the ENFIA discount formula and have no just claim to double compensation.

68. If the Court of Appeals envisioned a refund proceeding that is analogous to a Section 204 refund,[55] we would not automatically award a refund if we had found that an access rate was unlawful. It would be necessary for us to consider whether, in view of the entire backdrop of the practical consequences and the equities, refunds pursuant to Section 204 of the Act should be awarded.[56] In this case we should not award refunds. First, in order to award refunds for discriminatory rates, equitable principles require consideration of whether the carrier was unjustly enriched by the discriminatory rates. The telephone companies earned a negative return on ENFIA services.[57] If a discriminatory rate is noncompensatory, refunds are not justified.[58] Second, the access charge system established in CC Docket No. 78-72 prescribed nondiscriminatory access compensation methods which resulted in significantly *higher* rates to the OCCs for the same quality of interconnection they had obtained under ENFIA. While a later Commission-prescribed just and reasonable nondiscriminatory rate does not inevitably establish what earlier lawful rates would have been,[59] it is an equitable consideration.[60] Regardless of the magnitude of the interstate revenue requirement during the life of ENFIA compared to the interstate revenue requirement at the effective date of access charges, the OCC discount declined from a total of approximately 70% to 55%.[61] The nondiscriminatory access charge system prescribed by this Commission would result in higher ENFIA rates, not lower ENFIA rates. Third, OCC claims of unlawful discrimination and requests for refunds, based upon the difference between local FX-CCSA and ENFIA rates, presume that the OCCs were entitled to the same method and level of access compensation for Execunet-type services that was afforded FX-CCSA services of AT&T or OCCs and other services (*e.g.*, local business exchange rates), although the OCCs' use of exchange facilities was for the provision of interstate end-to-end service. We explicitly rejected this contention during the *ENFIA* proceeding.[62] We do so again. In view of all the equities, we find that refunds are neither required nor would they be just.

69. Three formal complaints against the ENFIA tariffs were filed by Allnet, US Telephone Communications and Telesphere Network.[63] Although MCI did not file a formal complaint, it now requests damages pursuant to Section 206 of the Communications Act.[64] On the basis of the complex facts of this case, we could not award damages to the OCCs. First, damages may not be awarded for a noncompensatory discriminatory rate.[65] Second, complainant must not only demonstrate the unlawful discriminatory rate, but also the fact and amount of damages with reasonable certainty.[66] The measure of damages is not the difference between the discriminatory rate to customers and a just and reasonable rate, but actual damage to the complainant by virtue of the unlawful preference, or profits lost because of the ability of the favored customer to control the market price of complainant's goods or services.[67] Complainants fail to make even the necessary allegations.[68] As previously stated, our own analysis indicates that the OCCs would not have

realized greater profits if the discrimination or preferences among AT&T services had been corrected at anytime before our access charge plan became effective.

70. The telephone companies argue that the ENFIA tariff could not be modified because the ENFIA tariff was not carrier-initiated, or because it was an intercarrier contract for which no public interest reason for modification has been presented, and thus no refunds or damages can be awarded. Although the ENFIA tariff was not a conventional carrier-initiated tariff,[69] it was not Commission-prescribed.[70] While the Commission has no explicit statutory authority to modify intercarrier contracts, our authority to modify intercarrier contracts, if compelling public interest considerations so require,is well established.[71] Accordingly, we have chosen to address the merits of the issue. We do note, however, that no commenter presented any public interest reason, as distinguished from its own private interest, for modification of the ENFIA rates.

71. The OCCs generally take the position that since the ENFIA rates were the result of an "Interim Agreement" and effective for a limited "interim" period until the Commission could prescribe a new access compensation system, then the ENFIA rates are inherently adjustable retroactively, and refunds are justified. We cannot agree. The authority cited by the OCCs for the proposition that interim rates are inherently subject to adjustment refers to Commission-ordered interim rates based upon incomplete information and imposed in the absence of a carrier agreement or an effective tariff.[72] The ENFIA rates in question were the result of an intercarrier contract and were tariffed rates, but not Commission-ordered or prescribed. We did not order any billing and collection rate pending investigation, but approved the ENFIA Agreement.

72. While we have determined that neither refunds nor damages to any ENFIA customers are appropriate, the issue whether Paragraph 3 of the ENFIA Agreement constitutes a waiver by the signatories still should be resolved. We find that the express language of Paragraph 3 constitutes a waiver by the signatories of any right to attack the lawfulness of the ENFIA Agreement and the formula to establish ENFIA rates. None of the commenters in any way distinguish Paragraph 3 from standard settlement provisions waiving the right to continue pursuit of claims which formed the original basis of the dispute. Nor has the conduct of any signatory evidenced any intent of the signatories which could justify interpreting the agreement contrary to its explicit language.[73] Neither MCI nor Lexitel provide any information to support their allegations of deceit by the Commission regarding the lengthy proceedings required to resolve the FX-MTS/WATS discrimination in CC Docket No. 78-72, or the implication of coercion by the telephone companies during the ENFIA negotiations.[74]

73. The waiver is not limited to the term of the ENFIA Agreement. By the express language of Paragraph 3, "notwithstanding the foregoing," the signatories agree to refrain from attacking the lawfulness of the Agreement without a time limit. Nor can MCI challenge the ENFIA Phase II rates upon the claim that it is merely challenging Commission-prescribed rates and not the Agreement. The Phase II ENFIA rates were not prescribed by the Commission, but were the result of interpretation by the Commission of the ENFIA Agreement.[75] Nor can the language of Paragraph 3 be considered expressly or impliedly an agreement to suppress evidence. It is a standard provision to forego litigation, in this case concerning the lawfulness of rates established by the Agreement.

74. In view of the signatories' express waiver of the right to challenge the lawfulness of the ENFIA Agreement, reached after arms length bargaining, we find that even if it could be established that the ENFIA rates were unlawful and that the signatory OCCs suffered actual damage, neither the signatory OCCs nor the signatory telephone companies could collect refunds, damages, or additional charges.

75. Additionally, the telephone company counter-claims for recovery of additional charges are questionable in light of the Section 203(c) requirement that a carrier collect only its tariffed rate. To permit the telephone companies to collect additional charges based upon the later-prescribed access methods for determining charges for OCC nonpremium services would constitute retroactive rulemaking, to the inequitable detriment of the OCCs who relied upon the ENFIA rates and Commission policies underlying those rates, with no apparent or alleged public benefit.[76]

Conclusion

76. For all the reasons stated above, we find that the the OCCs were not "victimized" by the ENFIA rates or the existence of discrimination between FX-CCSA, ENFIA, and MTS/WATS access compensation. It would be unjust to award refunds or damages under the circumstances. Of major importance are the noncompensatory nature of the ENFIA rates and the lack of unjust enrichment to the local telephone companies, the fact that a nondiscriminatory access system would have resulted in higher rates to the OCCs, and the untenable assumption underlying the OCCs' requests for damages and refunds that they had no obligation to make a contribution to the interstate revenue requirement of local exchange facilities although the OCCs used such facilities for the provision of interstate service.

77. IT IS ORDERED that all requests for refunds and damages are DENIED, and that the outstanding complaints before this Commission against the ENFIA tariffs are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX A

Comments:

Allnet Communication Service, Inc.
Ameritech Operating Companies
Association of Long Distance
Telephone Companies (ALTEL)
American Telephone and
Telegraph Company
Lexitel Corporation
MCI Telecommunications Corporation
Mountain States Telephone
and Telegraph Company,

Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company
Satelco Incorporated and Teltec Saving Communications Co.
Satellite Business Systems
STARNET Corporation

Telephone Companies:

The Bell Telephone Company of Pennsylvania
The Diamond State Telephone Company
Nevada Bell
New England Telephone and Telegraph Company
New Jersey Bell Telephone Company
New York Telephone Company
Pacific Bell
South Central Bell Telephone Company
Southern Bell Telephone and Telegraph Company
Southwestern Bell Telephone Company
Telesphere Network, Inc.
United States Telephone Association
U.S. Telephone, Inc.
United States Transmission Systems, Inc.
Western Union Telegraph Company

Reply Comments:

Ad Hoc Telecommunications Users Committee
Allnet Communication Services, Inc.
American Telephone and Telegraph Company
Ameritech Operating Companies
Lexitel Corporation
MCI Telecommunications Corporation
Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company
Satelco Incorporated and Teltec Saving Communications Co.
Satellite Business Systems
STARNET Corporation

Telephone Companies:

United States Telephone Association
Western Union Telegraph Company

FOOTNOTES

[1] *ENFIA* (Extension), 90 FCC 2d 6 (1982).

[2] The term "OCC" or "other common carrier" is commonly used to describe carriers that offer interexchange telecommunications services in competition with the American Telephone and Telegraph Company (AT&T).

[3] A list of those filing comments and reply comments is attached to this Order as Apppendix A.

[4] 29 FCC 2d 870 (1971), *aff' d sub nom. Washington Utilities & Transportation Commission v. FCC*, 513 F. 2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[5] *See Bell System Tariff Offerings*, 46 FCC 2d 413, *aff' d sub nom. Bell Telephone Co v. FCC*, 503 F. 2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

[6] *MCI Telecommunications Corp. v. FCC*, 561 F. 2d 364 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *MCI Telecommunications Corp. v. FCC*, 580 F. 2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978).

[7] 67 FCC 2d 757 (1978).

[8] *See Amendment of Part 67*, 89 FCC 2d 1, 5, *modified*, 90 F.C.C. 2d 522, *reconsideration denied*, 91 FCC 2d 558 (1982), *petition for review pending sub nom. MCI Telecomm. Corp. v. FCC*, No. 82-1237 (D.C. Cir. filed March 4, 1982)

[9] The *Execunet* decisions did not address the questions raised regarding appropriate compensation to local telephone companies for origination and termination of interstate services provided to the OCCs. *Exchange Network Facilities for Interstate Access* (ENFIA), 71 FCC 2d 440, 442 (1979) ("Acceptance Order"). *See also MCI Telecomm. Corp. v. FCC*, 712 F. 2d at 523.

[10] *ENFIA*, 71 FCC 2d at 442-3.

[11] *Id.*

[12] *ENFIA*, 71 FCC 2d 440.

[13] The Agreement was to be effective until related issues were resolved in CC Docket No. 78-72, the *MTS and WATS Market Structure* inquiry, or other proceedings, or until federal legislation specified interconnection obligations and rights of the parties, or five years from the effective date of the Agreement, whichever occurred first.

[14] Paragraph 3. 43 Fed. Reg. 59129, 59130 (December 19, 1978). Signatories to the ENFIA Interim Agreement were American Telephone and Telegraph Company and the Bell System Operating Companies, MCI Telecommunications Corporation, Southern Pacific Communications Corp. (SPCC), ITT Corporate Communications Services, Inc., GTE Service Corporation, United States Independent Telephone Association (USITA), National Telephone Cooperative Association (NTCA), and Organization for Protection and Advancement of Small Telephone Companies (OPASTCO).

[15] The Interim Agreement was segmented into two phases. Phase I was to last three years, and would automatically terminate. Phase II, a period not to exceed two years, was to be implemented if the FCC were to determine it reasonable and in the public interest, and if the FCC were to determine an appropriate level of payment for the use of jointly used subscriber plant. ENFIA Agreement, Paras. 10-11. See 43 Fed. Reg. at 59131, 59132.

[16] *ENFIA* (Extension), 90 FCC 2d at 16. *Access Charge Order*, 93 FCC 2d at 258 (1983).

[17] *AT & T*, 84 FCC 2d 384 (1981), *aff d*, *MCI Telecomm. Corp. v. FCC*, 675 F. 2d 408 (D.C. Cir. 1982).

[18] The Court held that criticisms of the *Separations Manual*, are not relevant to proving that the interim cost allocation manual improperly allocates costs among the interstate services, especially since no alternative superior to a separations methodology was available. Moreover, revisions had to come from a Federal-State Joint Board. *MCI Telecomm. Corp. v. FCC*, 675 F. 2d at 415.

[19] Ameritech Comments, p. 29. 47 *Telecommunications Reports* 4 (July 6, 1981); 48 *Telecommunications Reports* 7-8 (July 5, 1980). 1981, 1982, and 1983 Annual FDC Report. The authorized system return was 9.5% in 1976. *AT & T*, 57 FCC 2d 960, 972-75 (1976). In 1981, the authorized system return was increased to 12.75%. *AT & T*, 86 FCC 2d 221, 249-50 (1981).

[20] *See* para. 12, *supra*.

[21] "Historically, the major difficulty in arriving at the relevant costs has been that much of the local exchange plant consists of joint and common plant used indivisibly for both interstate and intrastate purposes, and the costs relevant to the interstate jurisdiction are not specifically identifiable. Thus, plant is apportioned under relative use concepts by augmenting the specifically identifiable cost by a factor intended to weight in relevant interstate costs which are not specifically identifiable. This cost apportionment process, [is] termed 'jurisdictional separations' . . . ." *ENFIA* (Acceptance), 71 FCC 2d at 445 (1979). "Existing separations procedures determine the interstate revenue requirement and, hence the pool of costs to be allocated among interstate services. Problems which exist with either the methodology or with its implementation . . . are not lessened by suggestions to determine the so-called 'true costs' of interstate services through detailed records, unit costing or other means. Any approach must result in the same total of interstate costs -- the total set by separations." *AT & T (ICAM)*, 84 FCC 2d at 393-4 (1981). The process of jurisdictional separations and of allocating jointly used plant has been long recognized as highly complex. *Groesbeck v. Duluth S. C. & A. R. Co.*, 250 U.S. 607 (1919). The Supreme Court has explicitly ruled that "allocation of costs is not a matter for the slide rule. It involves judgement on a myriad of facts. It has no claim to an exact science." Any cost concept as applied to jointly used plant subject to regulation by different jurisdictions requires the use of non-economic factors, *i.e.*, considerations of fairness, not mere mathematics. *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 589, 591 (1945).

"[T]he 'political' nature of the Separations Manual could not by itself invalidate the manual for use in ratemaking. The very problem at issue here --- allocation of common costs --- arises precisely because there is no purely economic method of allocation . . . . elements of fairness and other non-economic values inevitably enter the analysis of the choice to be made." *MCI Telecomm. Corp. v. FCC*, 675 F. 2d at 415-16.

[22] *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff d sub nom. Maryland v. United States*, 460 U.S. 1001. (1983).

[23] *ENFIA*, 91 FCC 2d 568, 576-77 (1982). We also noted that this situation did "not favor AT&T's MTS/WATS offering over those of its competitors." *Id.*, at 577 n.16.

[24] 93 FCC 2d 243 (1983).

[25] *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*. 96 FCC 2d 781, 803-05, 810 (1984), *petition for review filed. Rural Telephone Coalition v. FCC*, D.C. Circuit No. 84-1110 (and consolidated cases), filed March 22, 1984.

[26] *National Association of Regulatory Utility Commissioners, v. Federal Communications Commission*, 737 F. 2d 1095 (D. C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224 (1985)

[27] MCI had earlier filed a pleading titled "Complaint" with the Commission on December 17, 1981, alleging that rates paid by other BSOC customers for the same type of local exchange access provided to MCI (local exchange service provided to business customers with PBXs, foreign exchange customers, WATS extension customers, Federal Telephone System customers, value-added carriers, domestic record carriers, international record carriers, time-sharers and CCSA customers) were discriminatory. FCC File No. E-81-37. Although styled as a complaint concerning ENFIA charges, it could not be processed as a complaint because it was not directed at an existing tariff. Accordingly, we incorporated MCI's "Complaint" in CC Docket No. 78-72 as a comment on the access charge phase. It was also considered in the ENFIA proceedings as an expression of MCI's views with respect to the appropriate level of payment during an ENFIA extension. *ENFIA*, 90 FCC 2d at 9 & n. 3 (1982). MCI admittedly did not request either damages or refunds in its "Complaint". (Reply Comments, p.20) Instead MCI had requested an order requiring prompt elimination of the unlawful discrimination. MCI did assert in its Comments herein the right to recover the difference between the ENFIA rates it paid and the lower local business exchange rates paid by other services, as did other commenters. MCI's claims will be addressed in our disposition of the issue of retrospective relief, along with the other commenters' requests for relief.

[28] AT&T and the BOCs filed an "Answer" and a "Motion to Dismiss". Other pleadings before us are the U.S. TEL "Opposition to Motion to Dismiss" and "Supplement to Complaint and Request for Damages and Motion for Expedited Action"; the AT&T "Supplemental Answer" and "Reply to Opposition to Motion to Dismiss"; and the U.S.TEL "Supplemental Reply".

[29] Also before us are the AT&T "Answer," the TNI "Opposition to Motion to Dismiss," and the TNI "Reply Answer."

[30] Other pleadings before us are the AT&T "Motion to Dismiss" and "Answer"; the "Answer" of the BOCs, of Southern New England Telephone and Telegraph, of Cincinnati Bell and of Ameritech; the "Motion to Dismiss" of Ameritech, of Southern New England Telephone and Telegraph, of Cincinnati Bell; the "Opposition" of Allnet to each motion to dismiss; the "Reply" of Allnet to each "Answer"; Allnet's "Motion to Strike, or in the Alternative, Motion to Make More Definite and Certain"; Allnet's "Motion to Strike"; AT&T's "Reply to Opposition to Motion to Dismiss" and "Opposition to Motion to Strike, or in the Alternative, Motion to Make More Definite and Certain"; the BOCs' "Reply to Opposition to Motion to Dismiss" and "Opposition" to Allnet's "Motion to Strike, or in the Alternative, to Make More Definite and Certain"; Allnet's "Reply to Opposition to Motion to Strike"; Allnet's "Answer" to the Ameritech "Cross-Complaint"; Allnet's "Motion to Dismiss" against the Ameritech "Cross-Complaint"; and Ameritech's "Opposition to Motion to Dismiss".

[31] USTA opines that the Court made such an erroneous assumption because the issue of whether ENFIA rates were discriminatory was not briefed. The CC Docket No. 78-72 decision which triggered the Court's concerns was not before the Court, but was under review in another proceeding. USTA notes that as a result, the Court, unfortunately, had not been fully briefed on the nature of the Access Charge Order.

[32] See Appendix A for the names of the ten Bell Operating Companies, which filed comments collectively as "The Telephone Companies," not to be equated with the generic terms "local telephone companies" and "telephone companies".

[33] Paragraph 3 of the ENFIA Agreement states: The terms of this Interim Settlement Agreement have been agreed to only for the Interim Period pending ultimate resolution of related issues in CC Docket No. 78-72 or in other appropriate proceedings. The terms agreed to are without prejudice to the right of each party to take different and inconsistent positions in any forum or proceeding. Notwithstanding the foregoing, the undersigned parties further agree that they will not attack or challenge this Interim Settlement Agreement or the lawfulness therefor, nor shall they rely upon it in whole or in part, in any forum or proceeding other than a proceeding directed to the interpretation or enforcement of this Interim Settlement Agreement.

[34] *Access Charge Order*, 93 FCC 2d at 258.

[35] *Id.* at 256-58. The *MTS and WATS Market Structure* inquiry was initiated as a policy rulemaking. *Notice of Inquiry and Proposed Rulemaking*, 67 FCC 2d 757 (1978). The Commission "initiated broad-gauged rulemaking to develop policies for the interstate long-distance market and it set prospective, policy

implementing rules." We neither established specific revenue requirements nor addressed the legality of specific rates. *NARUC v. FCC*, 737 F. 2d at 1120, 1132-3. The proceeding focused on the present and the future, rather than the past. *Access Charge Order*, 93 FCC 2d at 339.

[36] *MTS and WATS Market Structure* (Supplemental Notice), 73 FCC 2d at 233-34; *Second Supplemental Notice*, 77 FCC 2d at 228-31 (1980); *Second Reconsideration*, 97 FCC 2d 834, 865 (1984); *Access Charge Order*, 93 FCC 2d at 257, 339. *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, 78 FCC 2d 837, 845 (1980). *AT & T, Applicability of the ENFIA Tariff to Certain OCC Services*, 91 FCC 2d 568, 576-77 & n. 16 (1982).

[37] *MTS and WATS Market Structure* (Supplemental Notice), 73 FCC 2d at 234 (1979). *Second Supplemental Notice*, 77 FCC 2d at 228-31 (1980). *Amendment of Part 67* of the Commission's Rules and Establishment of A Joint Board (Notice of Proposed Rulemaking), 78 FCC 2d at 845 (1980); *Decision and Order*, 96 FCC 2d 781, 803-05, 810 (1984). *AT&T, Applicability of the ENFIA Tariff to Certain OCC Services*, 91 FCC 2d at 576-77 & n. 16.

[38] *AT&T*, 73 FCC 2d 679 (1979). *AT&T*, 84 FCC 2d 384 (1981), *aff'd MCI Telecomm. Corp. v. FCC*, 675 F. 2d 408. (D.C. Cir. 1982). *Access Charge Order*, 93 FCC 2d at 273.

[39] *See, e.g., Arizona Grocery Company v. Atchison, Topeka & Santa Fe Railway Company*, 284 U.S. 370, 388 (1932). *Baer Brothers Mercantile Company v. Denver & Rio Grande Railroad Company*, 233 U.S. 479, 486 (1914). *See* also *MCI Telecomm. Corp. v. AT&T*, 85 FCC 2d 994, 998-99(1981).

[40] *Baer Brother Mercantile Company v. Denver & Rio Grande Railroad Company*, 233 U.S. at 488.

[41] *MCI Telecomm. Corp. v. AT&T*, 74 FCC 2d 184, 193-94 (1979).

[42] Whether to proceed by rulemaking or adjudication in changing agency standards is a matter within the informed discretion of the administrative agency. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

[43] See notes 32 and 33, *supra*. *See* also ENFIA (Extension Order), 90 FCC 2dat 16-17.

[44] *MTS and WATS Market Structure (Second Supplemental Notice)*, 77 FCC 2d at 230-31; *Access Charge Order*, 93 FCC 2d at 257, 273. ENFIA, 90 FCC 2d at 16-17.

[45] *Access Charge Order*, 93 FCC 2d at 258.

[46] *MTS and WATS Market Structure* (Second Supplemental Notice), 77 FCC 2d at 228-30, 235; *Access Charge Order*, 93 FCC 2d at 258.

[47] *MTS and WATS Market Structure* (Second Supplemental Notice), 77 FCC 2d at 245.

[48] *MTS and WATS Market Structure*, 77 FCC 2d at 237-39, 245; *Access Charge Order*, 93 FCC 2d at 297-98. Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC 2d at 803-05, 810.

[49] *See* ENFIA, 93 FCC 2d at 743, 758-60.

[50] ENFIA, 71 FCC 2d at 445-46.

[51] *See* ENFIA, 93 FCC 2d at 743, 758-60.

[52] ENFIA 90 FCC 2d at 10, 15 (1982). *Access Charge Order*, 93 FCC 2d at 248.

[53] *Groesbeck v. Duluth S.C. & A.R. Co.*, 250 U.S. 607 (1919); *Colorado interstate Gas Co. v. FPC*, 324 U.S. at 589, 591; *MCI Telecomm. Corp. v.FCC*, 675 F. 2d at 514-16. *See* also ENFIA, 93 FCC 2d at 758-9; *AT&T*, 84 FCC 2d at 393-94.

[54] ENFIA, 71 FCC 2d at 445.

[55] Section 204 procedures could not be directly applicable because we did not initiate a Section 204 investigation of FX or ENFIA tariffs and did not invoke any of the procedures that would normally be a condition precedent to a Section 204 refund.

[56] The discretionary authority of this Commission with regard to refunds is well established. See *Las Cruces TV Cable v. FCC*, 645 F 2d 1041, 1047-8 (D.C. Cir. 1981); *Nader v. FCC*, 520 F. 2d 182, 206 (D.C. Cir. 1975); *Wilson & Co. v. US*, 335 F. 2d 788, 797, (7th Cir. 1964), *cert. denied* 380 U.S. 951 (1965). *See* also *Wisconsin Electric Power Co. v. FERC*, 602 F. 2d 452, 457 (D.C. Cir. 1979); *Placid Oil Company v. FPC*, 483 F. 2d 880, 905 (5th Cir. 1973) *aff'd, Mobil Oil Corp. v. FPC*, 417 U.S. 283 (1974).

[57] *See* Paragraph 18, *supra*. Allnet made the bare allegation that the telephone companies earned a reasonable and compensatory return, but supplied no data. Allnet states that it had demonstrated that AT&T overstated its costs during its challenge to the ENFIA BSOC Tariff No. 10. In fact, no commenter in either ENFIA or MTS and WATS Market Structure supplied any useful information concerning the cost of providing any interstate access services. See note 48, *supra*.

[58] *Atlantic Coast Line RR v. Florida*, 295 U.S. 301, 304 (1935); *Moss v. CAB*, 521 F. 2d 298, 302, 308-9, 314 (D.C. Cir. 1975); *Williams v. Washington Metropolitan Transit Authority*, 415 F. 2d 922, 945-6 (D.C.Cir. 1968) *cert. denied*, 89 S. Ct. 860 (1969).

[59] MCI objects to consideration of the access charges resulting from the Commission's adoption of the access charge system on the ground that interstate costs were not necessarily the same during the ENFIA period and after the adoption of access, because of changes such as inflation and additional plant investment. Assuming increased plant investment and continuing inflation in the post-ENFIA period, comparison of ENFIA and access rates is still appropriate. The higher access rates resulted from reduction in the ENFIA discount, not from allowances for additional plant investment or inflation.

[60] *Atlantic Coast Line Railroad Co., v. Florida*, 295 US at 316-17. *American Television Rely, Inc.*, 67 FCC 2d 703, 708 (1978), *aff'd Las Cruces TV Cable y. FCC*, 645 F. 2d 1041. *Williams v. Washington Metropolitan Area Transit Commission*, 415 F. 2d at 945.

[61] *MTS and WATS Market Structure*, 97 FCC 2d at 860-62.

[62] ENFIA, 71 FCC 2d at 445-6 (1979).

[63] The TNI complaint requests refunds. Allnet and US Telephone request damages.

[64] *See* note 23, *supra*.

[65] *Danna v. Air France, infra* at note 61.

[66] *Interstate Commerce Commission v. United States*, 289 U.S. 385, 389-93(1933). *Danna v. Air France*, 334 F. Supp. 52, 63-64 (S.D.N.Y. 1971), *aff'd* 463 F. 2d 407 (2d Cir. 1972). *US Cablevision Corp. v. New York Telephone Co.*, 53 FCC 2d 1241, 1242-43 (1975). *Armstrong Utilities, Inc. v. GTE of Pennsylvania*, 25 FCC 2d 385, 390 (1970). *Hughes Sports Network, Inc. v. AT&T*, 25 FCC 2d 550, 555 (1970 by the Review Board).

[67] *Interstate Commerce Commission v. United States*, 289 U.S. at 389-93; *Danna v. Air France*, 334 F. Supp. at 63-64.

[68] No complainant specifies an amount of damages or a method of computing damages. Lexitel (not a complainant) in its Comments proposes lost revenue as a measure of damages, but revenue lost due to diversion of money to paying discriminatory rates instead of investing in plant. Lexitel does not address competitive disadvantage due to discriminatory rates. Another noncomplainant, Satelco, in its Comments contends that unnamed "others" received access at lower rates and thus the OCCs were disadvantaged in marketing service to customers. This bare and incomplete allegation does not raise a substantial question of fact as to the presence or amount of damages. "There must be full disclosure of the conditions of the business, or of those affecting competition,including in particular, the capacity of the preferred producers to fix the prices for the market. Only then will the ultimate fact of damage emerge

from the evidentiary facts as an appropriate conclusion."Interstate Commerce Commission v. United States, 289 U.S. at 393.

[69] ENFIA, 93 FCC 2d at 759 (1983).

[70] *MCI Telecomm.Corp v. FCC,* 712 F. 2d at 538. Approval or prescription of rates refers to rates promulgated by the Commission in the exercise of its quasi-legislative authority to set rates for the future. A finding that rates are just and reasonable, or acceptance for filing of a tariff, does not constitute approval or prescription, even though the agency declared in advance that the new rates would be filed and not suspended. *Public Utilities Commission of California v. United States,* 356 F. 2d 236, 239-241 (9th Cir. 1966). Cert. denied 385 U.S. 816 (1966). Even if the Bureau's participation in ENFIA negotiations could be said to have informed the parties what ENFIA formula or rates would not be suspended. the Commission did not approve or prescribe the ENFIA rates.

[71] *Federal Power Commission v. Sierra Pacific Power Co.,* 350 US 348, 354-5(1956). *MCI Telecommunications Corp. v. FCC,* 665 F. 2d 1300, 1303(D.C. Cir. 1981). *Bell Telephone Co. of Pennsylvania v. FCC,* 503 F.2d 1250, 1279 (3d. Cir. 1974), cert. denied 422 U.S. 1026 (1975).

[72] *Lincoln Telephone and Telegraph Co.,* 72 FCC 2d 724 (1979) *aff'd* 659 F.2d 1092 (D.C. Cir. 1981). ENFIA, 93 FCC 2d at 761-62.

[73] Settlement agreements are construed according to their plain meaning,and reference to matters outside the agreement are not used to interpret the agreement contrary to its express language. C.J.S.,Compromise and Settlement, §21.

[74] MCI's "self-serving assertion that it would not have signed the ENFIA Agreement if it had known that Phase II might be implemented despite the pendency of the discrimination issue may properly be ignored. Not only did the FCC make no express promise to resolve the discrimination issue within three years, but it also plainly stated, in discussing possible resolution of the discrimination problem, that the parties precatory language is . . . not binding on us ." *MCI Telecommunications Corp. v. FCC,* 712 F. 2d at 533. The ENFIA Agreement was reached through arms-length bargaining among the affected parties. *Id.,* at 532.

[75] *See* note 66, *supra.*

[76] *Lemon v. Kurtzman,* 411 U.S. 192, 203-5 (1973). *RCA Global Communications, Inc. v. Western Union Telegraph Co.,* 521 F. Supp. 998,1004-5 (S.D.N.Y. 1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application of

INDIANA SWITCH
ACCESS DIVISION File No. W-P-C-5671

For authority pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's Rules and Regulations, to lease transmission facilities to provide access service to interexchange carriers in the State of Indiana.

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1986 Released November 14, 1986

By the Commission: Commissioner Quello concurring the result.

1. American Telephone and Telegraph Company (AT&T) has filed an application for review pursuant to Section 1.115 of the Commission's Rules and Regulations. 47 C.F.R. § 1.115, requesting that the Commission review and modify the action taken by the Chief, Common Carrier Bureau (Bureau) in *Memorandum Opinion, Order and Certificate* (Order) in File No. W-P-C-5671, Mimeo No. 3652, released April 10, 1986. In that Order, the Bureau, over MCI Telecommunications Corporation's (MCI) objections and AT&T's request for imposition of conditions, granted Indiana Switch Access Division (ISAD) authority to lease transmission facilities from its corporate affiliate, Indiana Switch Interexchange Carrier Division (ISICD), so that ISAD may provide to interexchange carriers (IXCs) centralized equal access service from a tandem switch in Indianapolis, Indiana.[1] ISAD has filed an opposition to AT&T's application for review.

2. In granting ISAD's Section 214 application, the Bureau found that the Commission's access policies for independent telephone companies (ITCs) require provision of equal access to interexchange carriers only to the extent and on the same basis it is offered to AT&T; ITCs, unlike the Bell Operating Companies (BOCs) and General Telephone Operating Companies (GTOCs), are under no obligation by the Modification of Final Judgment (MFJ) or Consent Decree (CD)[2] to provide interconnection with IXCs at points selected by interexchange carriers. Order at paras. 16 and 17. In addition, the Bureau concluded that Part 69 of the Rules, 47 C.F.R. Part 69, does not preclude an affiliate of a telephone company from providing access service. Order at para. 18. It also found that the organizational structure employed by Indiana Switch was consistent with the requirements outlined in the *Fifth Report and Order* in CC Docket No. 79-252, 98 FCC 2d 1191, 1198 (1984) and that ISICD is a non dominant interexchange carrier while ISAD is a dominant carrier providing exchange access service. Order at paras. 18 and 19. The Bureau found allegations of possible rate discrimination by ISAD in favor of ISICD should be resolved when ISAD files its tariff and support material, citing similar action in *Memorandum, Opinion and Order* in American Telephone and Telegraph Company application File No. W-P-C-5560, released March 10, 1986. Finally, while it recognized that the ISAD proposal would likely increase operating costs of the IXCs, the Bureau concluded that the introduction of an efficient means of implementing equal access to a class of subscribers who otherwise might well be denied the benefits of IXC competition was overriding, and granted the application.

Arguments and Discussion

3. AT&T focuses its application for review on three issues, all of which were discussed in the Bureau's order. First, AT&T argues that the Commission's access interconnection requirements for ITCs do follow those imposed on the BOCs and GTOCs by the MFJ and CD, respectively. It urges that because the IXCs are in the best position to determine how to locate interconnection points to create efficiencies and lower costs, all exchange carriers, including the ITCs, should be, and in fact are, required to interconnect at points designated by the IXCs. To support its argument, AT&T cites *Notice of Proposed Rulemaking* in CC Docket No. 78-72 (Phase III - MTS/WATS Market Structure), 94 FCC 2d 292, 300 (1983):

> We view this proceeding as complementary . . . to the provisions of the MFJ addressing certain BOC interconnection obligations . . . . [W]e are proposing *to extend to all carriers interconnection requirements analogous to those of the MFJ* . . . . (Emphasis added.)

AT&T's argument ignores the fact, noted by the Bureau in the order, that the access requirements adopted for the BOCs and GTOCs are different from those approved for the ITCs. The order correctly said that the issue of whether or where ITCs must deliver traffic to IXCs' points of presence (POPs) was not decided in the Commission's seminal equal access order. *See, Report and Order* (MTS/WATS Market Structure), 100 FCC 2d 860 (1985). Thus, AT&T's insistence that the Commission adopted a policy in the *Report and Order* favoring IXC choice of POPs is unfounded.

4. In our "Equal Access Implementation Plan", outlined in *Report and Order* (MTS/WATS Market Structure), *supra* at 873-80, we established a unique access policy for ITCs. At p. 874 we stated:

> We must also take into account that GTE has committed itself to following the schedule set forth in the CD and that, consequently, the commitments already undertaken by the BOCs and the GTOCs will pace the implementation of equal access for approximately 89 percent of the nation's access lines. *We need, therefore, only adopt a policy applicable to, and appropriate for, the remaining 1413 ITCs, which serve the remaining 11 percent of access lines.* [Emphasis added.]

That policy, adopted in *Report and Order*, *supra* at 877, requires that the elements of access service offered by the ITCs to the IXCs be available only to the extent and on the same basis as they are offered to AT&T. The Commission has not constrained ITCs' operations to specific geographic boundaries. The record reveals that ISAD will offer (a) interconnection to all IXCs equal in type and quality to that AT&T will receive; (b) presubscription; and (c) access to all IXCs via a minimum number of digits. These service features comport with our ITC equal

access plan. Therefore, we find no error in the Bureau's conclusion that ISAD's proposal is consistent with our access rules and policies.

5. Similarly, AT&T's second argument, that ITC control over the designation of POP locations jeopardizes all IXCs' existing and future POP construction investments, is fully addressed in the Order below. The Bureau stated at paras. 23 - 24:

> Introduction of this service arrangement into the United States' communications system will produce many changes in the way network planning is conducted. Until we have a clearer picture of the overall impact of the subject proposal, we will not establish by this authorization a blanket policy favoring similar proposals elsewhere. Each future application will be examined independently on the unique facts and issues presented therein. . . .
>
> We realize that changing from a monopoly market structure to a competitive one will require some entities, such as AT&T, to experience some unplanned costs and to alter their approaches to providing service. But the benefits of proposals which will efficiently render desirable access service to the public and offer a variety of modern, competitive, alternatives to a class of subscribers that perhaps would otherwise be denied them sufficiently outweigh the anticipated costs these entities may incur. The overriding concern here is that the public interest be served in a manner consistent with the Commission's charge of assuring that all people of the United States have available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charge . . . ." We find that ISAD's proposal is a reasonable means to that end, and therefore does not violate Section 201 of the Act. [Footnote omitted].

The $230 million AT&T states it plans to spend over the next three years to construct new POPs or augment existing POP facilities to serve customers in ITC territories does not justify a finding that the instant proposal is not in the public interest. As noted in the Bureau's order, the cost increases ISAD's proposed arrangement imposes on AT&T are outweighed by the proposal's benefits to thousands of subscribers in Indiana. *Id.* Total planned expenditures on a national scale cannot reasonably be weighed against the costs of the limited proposal before us. In addition, ISAD offers to provide IXCs co-location space at its tandem switch in Indianapolis, which should further minimize the proposal's financial impact. We find that AT&T has not offered any convincing new data to support its argument that ISAD's control of POP location designation jeopardizes all of AT&T's or other IXCs' current or proposed construction plans. If in some future case an IXC demonstrates that an ISAD-like proposal significantly increases IXCs' operating costs without significant increases in service choices or benefits to subscribers, or unreasonably designates ITC points of interconnection with IXCs, we may reach a different result. In other words, our decision permitting ISAD to proceed should not be interpreted as unbounded authority on the part of ITCs, or their affiliates, to determine points of interconnection with IXCs.

6. In the Bureau's Section 214 proceeding, AT&T asked for the imposition of certain conditions that it argued would protect IXCs against possible discrimination and cross-subsidization between ISAD and ISICD. As its third argument, AT&T challenges the Bureau's decision to defer consideration of these conditions to the subsequent tariff proceeding.[3] It argues that the discrimination and cross-subsidization issues are basic policy issues which should be resolved before any finding that ISAD's application is in the public interest. AT&T Petition at p. 20. We do not agree. As the Bureau correctly observed, tariff submissions generally are examined in Section 214 proceedings only insofar as it is necessary to determine on a *prima facie* basis whether costs are so substantial relative to benefits that the public interest would not be served by construction of the project. Order at para. 20. Tariff review is governed by discrete statutory provisions which concern pleading cycles, remedies, administrative procedures and other matters. It is in that proceeding that essential facts bearing on possible discrimination or cross-subsidization are best examined and appropriate action taken. We cannot find that the Bureau's determination that the complaint provisions of Title II of the Act and the tariff proceeding attendant upon ISAD's tariff filing will adequately disclose unlawful terms, conditions or practices was in error.[4] We remind ISAD that no access tariff will be allowed to become effective which unreasonably discriminates or contains unjust or unreasonable terms and conditions. Pricing strategies or rates, cost support data, terms and conditions of the tariff submitted will be analyzed to ascertain the existence of any unreasonable discrimination or cross-subsidization by ISAD. Should we detect any such infirmities we are prepared to impose more strigent conditions on ISAD. AT&T offers no new persuasive evidence that warrants review of these matters.[5] Therefore AT&T's request in this regard is denied.

7. We have fully reviewed AT&T's application for review and find no reason to disturb the Bureau's decision.

8. Accordingly, IT IS ORDERED, that the Application for Review filed by American Telephone and Telegraph Company IS DENINED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1]. ISAD filed the captioned application for authority to lease a number of DS-1 (1.544 mbps) digital channels in order to provide equal access to the subscribers of 27 Indiana independent telephone exchange carriers from a central location. For a more detailed description of ISAD's proposal, see Order at para. 2.

[2]. The Modification of Final Judgment (MFJ), United States v. American Telephone and Telegraph Co., 552 F. Supp 131, 229 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983) and Consent Decree (CD) United States v GTE Corporation, Civ. Action No. 83-1298 (D.D.C. December 13, 1984).

[3]. In addition to the condition imposed by the Bureau's Order, AT&T requested imposition of the following conditions:

> 1. That interexchange traffic be delivered to the point in the LATA or exchange area designated for that purpose by the IXC;

2. IXC's including Indiana Switch's Interexchange Division, be charged for local transportation between the ITC end office and the IXC interconnection point within the LATA or exchange area where the call originates or terminates, irrespective of Indiana Switch's provisioning arrangements; and

3. Indiana Switch Interexchange Division furnish capacity to its Access Division at the lowest rate charged to any customer, in order to prevent cross-subsidization of its interexchange operations, and also report to the Commission within thirty days any amendment or modification of the leases between the Access Division and the Interexchange Division. AT&T Application for Review, PP. ii-iii.

[4]. Moreover, the policies adopted in our Fifth Report and Order in CC Docket No. 79-252, 98 FCC 2d 1191 (1984), provided for the organizational structure employed by ISAD without the type of onerous conditions AT&T seeks. Under our policies adopted in the Fifth Report and Order an exchange carrier and its interexchange affiliate may exist without structural separation provided they maintain separate books of account and do not jointly own transmission and switching facilities. Until there is evidence these are ineffective guards against such conduct this form of corporate structure and operation will be permitted.

[5]. AT&T's argument that the charge for local transport should be based on the airline distance between the end office and the IXC POP in the LATA because this is the approach used in the NECA and other access tariffs is particularly an issue best resolved in the tariff proceedings.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM DOCKET NO. 85-132

VELA BROADCASTING CO.	File No. BPCT-841127KH
SAN ANTONIO VIDEO CORP.	File No. BPCT-841129KG
TV 60 LIMITED PARTNERSHIP	File No. BPCT-841129KH
Lesvia Guerra-Cox and Cynthia (Fitrah) Muhammud d/b/a AMISTAD COMMUNICATIONS OF THE SOUTHWEST	File No. BPCT-841129KJ
PRO 60 COMMUNICATIONS	File No. BPCT-841129KZ
SAN ANTONIO BROADCASTING, INC.	File No. BPCT-841129LA
David A. Davila, et al. d/b/a NUEVA VISTA PRODUCTIONS	File No. BPCT-841129LD

For Construction Permit for
New Television Station
San Antonio, Texas

Appearances

Robert Allen, Thomas McCabe, Rachel Davis, William J. Franklin and William Chambers on behalf of Vela Broadcasting Co.; *Robert Thompson, Daniel Yakoubian,* and *Robert Aldrich* on behalf of San Antonio Video Corp.; *David Oxenford, Richard Bodorff,* and *Susan Borke* on behalf of TV 60 Limited Partnership; *William Jarvis, Merilyn Strailman* and *Thomas Hart* on behalf of Lesvia Guerra-Cox and Cynthia (Fitrah) Muhummad d/b/a Amistad Communications of the Southwest; *Roger Furey, Laura Klaus, Howard Liberman,* and *Nora Garrotte* on behalf of Pro 60 Communications, Inc.; *Walter Diercks* and *James Winston* on behalf of San Antonio Broadcasting, Inc.; *Christopher Wood, Harry Martin* and *Matthew McCormick* on behalf of David A. Davila, et al., d/b/a Nueva Vista Productions; and *Paulette Laden* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW

JUDGE EDWARD J. KUHLMANN

Issued: November 5, 1986 Released: November 17, 1986

On April 30, 1985, the Chief, Video Services Division designated for hearing 13 mutually exclusive applications for a new commercial television station to operate on Channel 60, San Antonio. 50 Fed. Reg. 21,938 (1985). Seven applicants remain [1] and the following issues will be considered, among other pending matters, about their applications:

1. To determine whether Lesvia Guerra-Cox and Cynthia (Fitrah) Muhammad d/b/a Amistad Communications of the Southwest have failed to make their public inspection file available, as required by Section 73.3526 of the Commission's rules, and, if so, the effect thereof on the applicant's comparative qualifications.
2. To determine whether San Antonio Video Corp. misrepresented that it was financially quali- fied when it certified its qualifications in its application and whether it misrepresented the facts regarding its financial certification in answering interrogatories and, if so, whether San Antonio Video Corp. is qualified.
3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. A prehearing conference was held on July 23, 1985, hearing sessions were held from December 9 to December 17, 1985 and June 16 and 17, 1986. The record was closed on June 17, 1986. Tr. 2228, 2250; *Memorandum Opinion and Order,* FCC 86M-2009, released June 19, 1986. Proposed findings were filed on February 10, 1986 by all parties and replies were filed on March 17, 1986. Supplemental proposed findings were filed by Vela, San Antonio Video, Pro 60, San Antonio Broadcasting and Nueva Vista on July 8, 1986 and they filed replies on July 21, 1986.

FINDINGS OF FACT

I. The Availability of Amistad's Public File.

3. Amistad hired David B. Person, an attorney with the law firm of Brock and Kelfer in San Antonio, to handle the local aspects of its application. Mr. Person supervised the maintenance of Amistad's public file at his office. Amistad Exh. 5 at 1. At a meeting with the Amistad principals, the contents and handling of the public file were discussed along with the original formation and organization of the applicant. Tr. 903-04. In written direct testimony, Mr. Person stated that Ms. Guerra-Cox told him Amistad's public file should be placed in a public area at the law firm, and made available for public inspection, upon request, during the hours of 9:00 a.m. to 5:00 p.m., Monday through Friday. Amistad Exh. 5 at 1. Amistad's instructions to Mr. Person were oral, and he was never shown a copy of the FCC rules pertaining to public inspection files. Tr. 903.

4. Mr. Person testified that the file was assembled in the first part of December, and placed in the firm's conference room. Tr. 889, 904-05. The conference room is separate from the firm's reception area, where a visitor to the firm is normally greeted by a receptionist. Tr. 889-90. Sometime before June 24 or 25, Mr. Person orally instructed his secretary and receptionist that there was a public file, located in the conference room, and it was available to whoever wanted to review it. Tr. 889-91, 896-97, 906-07. Initially, Mr. Person also told the recep-

tionist to maintain a list, in the file, of all persons requesting to review the public file. He testified that this practice has been discontinued. Tr. 892-93. There is one full-time receptionist at Mr. Person's firm, and "periodically" a back-up receptionist, but Mr. Person testified that he did not know the receptionists' rotation schedule. Tr. 897.

5. On June 17, 1985 David Cruz, a principal of Televista, arrived at Brock and Kelfer to view Amistad's public file. Amistad Exh. 5 at 2. In an affidavit attached to a petition to enlarge issues filed by Televista on July 29, 1985, Mr. Cruz stated that the receptionist at Brock and Kelfer told him that she knew nothing about a public file for Amistad. *Memorandum Opinion and Order*, FCC 85M-3351, released August 29, 1985, n. 7.

6. On June 24, 1985, Blanquita Cullum, a principal of San Antonio Broadcasters, Inc., visited the offices of Brock and Kelfer to review Amistad's public inspection file. Mr. Person was out of town. James W. Saunders, an attorney at the firm, spoke with Ms. Cullum. In an affidavit, Mr. Saunders states, "I instructed Blanquita Cullum that I would not allow her to look at a client's file without the specific permission of the client or the attorney handling the file." SABI Exh. 9 at 5. Mr. Saunders instructed Ms. Cullum to call Mr. Person within a short while, and told her that "if she was entitled to see the file I was sure that Mr. Person would allow her to see same." SABI Exh. 9 at 5.

7. When asked during his testimony what went wrong, Mr. Person answered that the two incidents occurred at a time when he and his secretary were out of the office for 10 days. Tr. 905. He also conceded that there could have been something wrong with his instructions to the receptionist. Tr. 906.

8. Mr. Person testified that after he found out about "the incident involving Ms. Cullum" he took steps to make sure that the attorneys and other employees in the office realized that the file was public in nature and could be viewed by anyone requesting it. Amistad Exh. 5 at 2. Written instructions were "probably" given to the receptionist on June 25 or 26. Tr. 897. Mr. Person stated in written testimony that after Ms. Cullum's visit, he removed Amistad's public file from the conference room and "taped it to the front of the receptionist's desk in full view of anyone entering the office who wished to inspect the file." Amistad Exh. 5 at 2. At hearing, however, Mr. Person testified that it is not the file, but merely the instruction sheet, which is taped to the desk. The file is on a shelf behind the receptionist. Tr. 901. The file was moved at the request of Ms. Guerra-Cox and because Mr. Person felt it was "appropriate" to have the public file in the reception area with very clear written instructions available. Tr. 899-900.

9. Mr. Person testified that, while he was not personally involved in the two unsuccessful attempts to view Amistad's public file, he was "ultimately responsible" for making sure the file was available for public inspection. Amistad Exh. 5 at 3.

II. The Honesty of San Antonio Video's Representations about Its Financial Qualifications on Form 301 and in Interrogatories.

10. Mary V. Decker, SAVC's president, signed the applications on November 27, 1984 and certified that the applicant was financially qualified. Nueva Vista Exh. 7 at 2, 3. Ms. Decker received the instructions to Form 301 from her counsel, Robert Thompson, and read them. Tr. 1925, 1990. Mr. Thompson stated that he was "thoroughly familiar" with the requirements of FCC Form 301 and "reasonably and generally familiar" with financial qualifications standards applied with the old Form 301. Nueva Vista Exh. 22 at 17-18, 19. He believed that the revised Form 301 "did not significantly change the underlying substantive standards." Id. at 20. He told the client this:

> I think what I told the client was that the Commission had recently changed its procedures and that there was no requirement for a detailed financial showing in the application, but that did not relieve us, as an applicant, for [sic] making a determination and a specific determination [sic] that there was a reasonable assurance that committed funds would be available. *Id.* at 20

Mr. Thompson characterized SAVC's principals as "very sophisticated business people" who fully understood the Commission's financial requirements. Id. at 19, 21.

11. In November 1984 SAVC's shareholders discussed their financial plan with Mr. Thompson and it was their "composite judgment" that they could certify that the applicant was financially qualified. Nueva Vista Exh. 22 at 11. With "assurances from the client," Mr. Thompson completed the final draft of the application; he advised Ms. Decker that the financial section was complete and she could certify the accuracy of the representation and sign the form. *Id.* at 10-11. Mr. Thompson said that prior to certification Oliver Heard told him that he had talked with Rupert Gresham of Frost Bank about loaning money to SAVC. *Id.* at 71-2.

12. When testifying in December 1985, Mary Decker said that Robert Thompson "told me that stockholders, on a pro rata basis, would have to make a loan to the company. And, of course, my percentage would enter into it as to the amount of the loan and so on." Tr. 262. In a sworn statement appended to SAVC's Opposition to Petition to Enlarge Issues, filed December 13, 1985, La Kita A. Jones stated that ". . . I believe that San Antonio Video Corporation shareholders are financially capable of loaning a minimum of $4 million to finance construction and initial operation of the station . . .." Nueva Vista Exh. 13 at 1. In another sworn statement, dated January 17, 1986, Ms. Decker stated: "By the time that I signed the SAVC application and thereby certified that SAVC was financially qualified, the investors in SAVC had agreed that they could loan $3-4 million to the company for the construction and initial operation of the station." Nueva Vista Exh. 14 at 12. This agreement to make pro rata loans to SAVC has never been reduced to writing. Nueva Vista Exh. 22 at 14; Tr. 2026, 2209-10. With respect to the pro rata agreement, Mr. Heard testified that the shareholders have not agreed on an interest rate, repayment terms or collateral Tr. 2113.

13. Oliver Heard stated at his deposition that initially, it probably was he who came up with the idea of pro rata contributions. Tr. 2073-74. At hearing, he stated "I guess that's right, yes." Tr. 2074. Mr. Heard further testified that it was Mr. Macon who "preferred to have the deal done by individuals putting the money in rather than by the company borrowing money because of the tax considerations." Tr. 2073.

14. Ms. Decker testified that she did not rely on any documents in making the November 1984 financial certification. Tr. 1934. In fact, she did nothing to make the

certification. Tr. 264-65. No written estimates were ever prepared for the cost of constructing and initially operating SAVC's proposed station. Counsel Robert Thompson provided Mary Decker with an oral estimate of $3-4 million as the total cost of these expenses. Nueva Vista Exh. 14 at 11-12; Nueva Vista Exh. 22 at 16; Tr. 1936. Ms. Decker testified that she did not speak with any banker prior to certifying SAVC as financially qualified in November 1984. Tr. 264-265. She did not have a letter of commitment from any lending institution at that time. Tr. 1934. Nor did Ms. Decker review any financial statements or other documents concerning the wherewithal of her fellow shareholders. Tr 266, 1934. Ms. Decker is "sure" that counsel Robert Thompson told her that all of SAVC's shareholders could meet their financial obligations. Tr. 1945-46. The only document ever created in connection with SAVC's financial qualifications as of November 1984 was the application itself. Nueva Vista Exh. 14 at 14; Nueva Vista Exh. 16 at 1.

15. Mary Decker testified in June that the financial certification on behalf of SAVC was based on "my knowledge that the money is available. I knew my son was a multi-millionaire and I knew, if necessary he would find a way to provide the funds." Tr. 1937. In her January 17, 1986 sworn statement she said that [s]ince I believed that my son Oliver Heard, Jr., was willing and able to loan up to that sum [the $3-4 million estimate] to SAVC himself, I did not need to see financial statements for any other investor . . .." Nueva Vista Exh. 14 at 12. However, Ms. Decker has never seen Mr. Heard's balance sheet and does not know how much cash he has in the bank at any one time, although she thinks he is a "very conservative man." Tr. 1937, 1975-76. In fact, Ms. Decker does not know if Mr. Heard intended to use his own personal assets as the basis of his pro rata contribution. Tr. 1991. Moreover, she "just took it for granted" in November 1984 that her son had spoken with someone at Frost Bank about the possibility of borrowing money in connection with SAVC's application. Tr. 1945.

16. Mary Decker similarly assumed P. Laurence Macon could come up with his pro rata share of the needed funds. Tr. 1945. Rather than checking with Mr. Macon regarding his net liquidity, Ms. Decker relied on her understanding that Mr. Macon was a prominent attorney in San Antonio, and on what she had heard about Mr. Macon from her son. Tr. 267. 1943. With respect to Heard, Goggan & Blair, which is responsible for one-third of SAVC's expenses, Ms. Decker relied only on her belief that the law firm was "strong." Tr. 267. She had never seen a balance sheet for the firm and did not know whether the firm intended to rely on its own assets or borrowing. Tr. 1943, 1991-92.

17. Ms. Decker never asked La Kita Jones what the source of her pro rata contributions would be. Tr. 1941. In fact, in November 1984, the two had never met. Tr. 267. Ms. Jones testified at the December hearing that she does not have the personal financial resources to meet her pro rata loan obligation. Tr. 539. And Congressman Bustamante's 1984 financial disclosure statement to the House of Representatives indicated that Mr. Bustamante had no more than $50,000 in net liquid assets to meet his pro rata obligation to lend SAVC 16.57% of the $4 million estimated expenses ($662,800). Nueva Vista Exh. 15. And, in 1984 Mr. Macon had to guarantee a $300,000 home loan for the newly-elected congressman because the bank "wouldn't loan the money to Mr. Bustamante on his credit alone." Tr. 2055-56.

18. Finally, Mary Decker never even reviewed her own financial resources to determine if she could meet her own pro rata obligation. Instead, she relied entirely on her son's assurances that he would lend her whatever money she needed to contribute to SAVC. Tr. 1938-39. But Ms. Decker testified that Mr. Heard has never given her any letter indicating his willingness to make such a loan. Nor have the two agreed on any interest rate, repayment terms or collateral. Tr. 1939-40. Nevertheless, Ms. Decker believes her son has made a legally binding commitment to her. Tr. 1940.

19. At the June hearing, Messrs. Heard and Macon testified that, pursuant to SAVC's November 1984 financial plan, they intend to jointly lend Ms. Decker, Ms. Jones, Ms. Romo and Mr. Bustamante all the money necessary for those shareholders to meet their pro rata obligation. SAVC Exh. 11 at 1-2. SAVC Exh. 12 at 1-2; Tr. 2071-72. However, when Ms. Decker was questioned at her May 1986 deposition concerning the basis for her statement in January (Nueva Vista Exh. 14, Appendix A at 1) that her fellow shareholders could loan money to the corporation, she made no mention of any plan for Mr. Heard and Mr. Macon jointly to lend other shareholders their contributions. When questioned at the June hearing why she did not refer to the joint loan from Mr. Heard and Mr. Macon at her deposition, Ms. Decker answered that "I guess it just didn't occur to me. . .." Tr. 1988.

20. The loan agreement between Mr. Heard and Mr. Macon and the four shareholders they intended to "carry" was never written down. Tr. 2034, 2071-72. The parties never discussed any interest rate, repayment schedule or need for collateral in connection with these joint loans. Tr. 2035, 2038, 2109-11. Mr. Macon testified that no limit on the amount he and Mr. Heard jointly will loan each shareholder has been set. Mr. Macon expects the terms for these loans will be set at the time he and Mr. Heard actually make the loans. Tr. 2035. Mr. Macon further testified that he and Mr. Heard never asked for the borrowers' financial statements because it "wasn't important" to them. Tr. 2040. Despite the fact that the agreement is oral, and lacks terms, Mr. Macon claimed at hearing that it is legally enforceable. Tr. 2044.

21. Mr. Heard and Mr. Macon represented that they never intended to rely on their own assets in making these loans to "carry" other shareholders, or in making their own pro rata contributions. Instead, they planned to borrow all of the funds necessary from Frost Bank in San Antonio. SAVC Exh. 11 at 2. SAVC Exh. 12 at 2; Tr. 2080, 2084-85. Mr. Heard "never thought for a second" about relying on his own net liquid assets because he believed that was "a very foolish way to proceed." Tr. 2084-85. In fact, Mr. Heard does not think he checked to see if he and Mr. Macon had sufficient net liquid assets between them to advance two-thirds of the total estimated expenses. Tr. 2081, 2085.

22. The existence of a specific financial plan involving pro rata contributions, loans from Mr. Heard and Mr. Macon, and borrowing by Mr. Heard and Mr. Macon from Frost Bank, was first revealed at the June hearing. The following exchange during the hearing in December 1985 indicates that the plan was not in place then:

> Q:[BY MR. MARTIN]: Did you make any discussions yourself about how the station would be financed?

A:[BY MR. HEARD]: Well, only depending upon what all we had to do with the infusion of several million dollars that would be required and that would either be done by conventional methods of debt financing or by some sort of financing.

Q:Did you establish a plan of financing?

A:I don't think we established a firm plan as such.

Q:You did not?

A:No.

Q:Do you have --

A:We just -- we made a feasibility analysis that if the people got the license that the banks would loan them the money to build the deal. I mean, we studied it from that standpoint, and determined it could be done.

Tr. 454. In contrast, Mr. Heard testified at the June hearing that SAVC had a firm financial plan in the sense that he had made a legally binding commitment to the other principals. Tr. 2085. Mary Decker still does not know where Mr. Heard and Mr. Macon intend to get the money to make joint loans to the four SAVC shareholders they will "carry." In November 1984 she did not ask them if they had spoken with a bank or obtained assurance of a bank's willingness to make a loan in connection with SAVC's station. Tr. 1945, 1988-89.

23. Mr. Heard testified he spoke with Rupert Gresham, Vice President for Commercial Lending at Frost Bank, at least once or twice and probably several times before November 1984 concerning financing for SAVC's proposed station. Tr. 2104. However, Rupert Gresham testified repeatedly that he did not discuss financing for SAVC's proposed station with Oliver Heard until November 1985 -- approximately one year after Mary Decker's certification. Nueva Vista Exh. 21 at 18, 31, 90.

24. Mr. Macon cannot recall ever having discussed the joint loan plan with anyone at Frost Bank prior to Mary Decker's November 27, 1984 certification. Tr. 2041. Mr. Macon testified at hearing that he and Mr. Heard have "jointly borrowed" money from Frost Bank before. Tr. 2048. Mr. Macon further testified that he has borrowed "at least $100,000" from Frost Bank in a single loan before, which he is "pretty darn confident" was not secured. Tr. 2045-46. After reviewing the record of Frost Bank pursuant to a subpoena served by Nueva Vista, Mr. Gresham testified that Mr. Heard and Mr. Macon have never jointly borrowed from that bank. Nueva Vista Exh. 21 at 44. Moreover, Mr. Gresham testified that Mr. Macon's largest single loan was for approximately $95,000 and was secured. *Id.* at 45.

25. Mr. Heard testified that, when they did talk, he and Mr. Gresham never discussed a rate of interest, security, or repayment terms. Tr. 2103-04. As Mr. Heard stated at the deposition, he and Mr. Macon simply "decided we will give Frost Bank a shot at it." Tr. 2104. Mr. Heard further testified that he did not ask Mr. Gresham to lend him the money in their initial discussions. Rather, "I think I told [him] I would try to talk the other principals into doing business with his bank, as a favor to him . . .." Tr. 2091. He said that during these discussions, Mr. Gresham did not assure him that he would lend money for use by SAVC. Nevertheless, Mr. Heard felt he "was assured" he could get the money, and assured his mother the money was available. Tr. 2093. Mr. Heard said, "[t]here are certain categories of things that banks are going to do. I determined that this was something Frost Bank would do, they liked it." Tr. 2090.

26. Rupert Gresham's understanding of a possible loan for use by SAVC differs from Mr. Heard and Mr. Macon's understanding. Mr. Heard and Mr. Macon testified that they plan to jointly borrow the funds from Frost Bank as individuals. SAVC Exh. 11 at 2; SAVC Exh. 12 at 2. But Mr. Gresham believes that any loan by Frost Bank would be made to SAVC itself. Nueva Vista Exh. 21, at 21, 70. Further, Mr. Gresham assumes that all of the shareholders will guarantee the loan. Nueva Vista Exh. 21 at 36-37. While Mr. Macon stated that he believed he and Mr. Heard could borrow 100% of the funds necessary to finance the station without putting up their own cash (Tr. 2032), Mr. Gresham testified he assumed Mr. Heard, Mr. Macon and the law firm Heard, Goggan & Blair would all inject their own equity into the corporation. Nueva Vista Exh. 21 at 26-27.

27. Mr. Gresham said that his initial discussions with Mr. Heard about the station's financing occurred in late 1985, and culminated in Frost Bank's December 1985 bank letter, which was addressed to Mary Decker. Nueva Vista Exh. 21 at 20. SAVC, its shareholders and its communications counsel repeatedly have characterized that letter as nothing more than a hearing document obtained to defeat a petition to enlarge at the eve of the December hearing. Nueva Vista Exh. 14 at 5, 13-14; Nueva Vista Exh. 22 at 72.

28. Mr. Gresham said that his late 1985 discussions with Mr. Heard never passed beyond the "preliminary stage." Nueva Vista Exh. 21 at 31, 34. Mr. Gresham explained that the only "written estimate" he received from Mr. Heard was the $4,000,000 figure typed on a sample bank letter to Mary Decker which Mr. Heard supplied to him. *Id.* at 29. Mr. Heard never broke down the $4,000,000 estimate for Mr. Gresham into estimates for the costs of equipment, leases or programming. *Id.* at 32. And Mr. Heard never gave the banker "a business plan as such." *Id.* at 31. Mr. Gresham does not know if SAVC's principals have made any kind of market study about the new station, but said "I would have thought that they would." *Id.* at 32. Mr. Gresham testified that in his preliminary discussions with Mr. Heard in 1985 they reached no agreement as to the rate of interest or security which the bank would require in the event a loan were made to SAVC. *Id.* at 38. Before the terms are nailed down, Mr. Gresham will have to see a business plan for the station and the financial statements of the other shareholders. He expects there will be some bargaining over the loan terms at that time. *Id.* at 38-40.

29. Mr. Gresham testified that, during their initial discussions in 1985, Mr. Heard sent him "an example" of "a letter that he said he would like us to write." Nueva Vista Exh. 21 at 29-30. Mr. Heard testified that he discussed the bank letter with SAVC's counsel and perhaps the bank's attorney. Tr. 2098. The bank changed the sample letter to a form "we'd feel comfortable with." Nueva Vista Exh. 21 at 31. Mr. Gresham further testified that Mr. Heard asked him to write the loan commitment letter to Mary Decker, although "I don't know why." *Id.* at 52. Handwriting on the bank's original copy of the letter identified the addressee as the "mother of Oliver Heard, Jr." Nueva Vista Exh. 18 at 1. Mr. Gresham does not have Mary Decker's

personal financial statement on file, and Ms. Decker never came to Mr. Gresham's office to ask him for the letter. Nueva Vista Exh. 21 at 52. Mr. Gresham testified that the bank probably delivered the letter to Mr. Heard at his office, pursuant to an arrangement with Mr. Heard. *Id.* at 52-53.

30. The 1985 loan commitment letter from Frost Bank contains no terms regarding a rate of interest, repayment or security. Nueva Vista Exh. 18. Mr. Gresham does not consider the letter to be legally binding as "[t]here are too many contingencies." Nueva Vista Exh. 21 at 40. Moreover, the letter does not guarantee the availability of funds to SAVC. *Id.* at 60-62. Before a formal commitment could be issued by the bank, the loan would have to be presented "in all its attendant detail" to the senior loan committee at the bank for approval and the executive committee of the bank for confirmation. The formal commitment letter then issued would have to be approved by the senior loan committee and possibly the bank's attorneys. A formal written commitment would have to include interest rate, repayment schedule and terms of default. The bank would have to set aside the funds for the lender upon execution of appropriate documents. *Id.* at 61-62. Mr. Gresham agreed that SAVC's December 1985 letter, which does not incorporate an interest rate or various other terms and was not approved by the executive committee of the bank, really does not commit the bank to make funds available. *Id.* at 62.

31. Mr. Heard and Mr. Macon did not intend to loan money to the law firm Heard, Goggan & Blair to help it meet is pro rata loan obligation. SAVC Exh. 12 at 2; Tr. 2025, 2030, 2071. Nor did the law firm plan to rely on its assets in order to meet its pro rata obligations. Tr. 2085. Mr. Heard testified that Heard, Goggan & Blair could not have made its contribution from cash, as it does not retain any substantial amount of cash. In fact, the firm borrows on its line of credit to meet cash shortfalls on a regular basis. Tr. 2081.

32. Mr. Heard testified that prior to Mary Decker's financial certification he understood the law firm Heard, Goggan & Blair would borrow up to $1.34 million for its pro rata contribution from Frost Bank. He further testified that the firm has had reasonable assurance since at least November 27, 1984 that it could borrow this amount, based on "my own knowledge of the law firm's borrowing capacity at Frost Bank." SAVC Exh. 12 at 2. However, Rupert Gresham testified that he does not recall ever discussing the possibility of a loan to Heard, Goggan & Blair in connection with its investment in SAVC. Nueva Vista Exh. 21 at 22. When Laurence Macon was asked where the law firm would obtain one-third of $4,000,000, he responded that Heard, Goggan & Blair had a line of credit at Frost Bank in excess of the amount needed. He said the line was unsecured, so that the law firm "could borrow that without any problems." Tr. 2031. While Heard, Goggan & Blair had a line of credit at Frost Bank in November 1984 for $1 million, the use of this credit was limited. Mr. Gresham testified that the bank would not have wanted the firm to use this line of credit for investment purposes. He further testified that before the line could be used for investments, Heard, Goggan & Blair would have to report such use to Frost Bank and receive its approval. Moreover, the bank probably would have wanted the firm's investments to be financed in a different way. None of the partners in Heard, Goggan & Blair ever asked Mr. Gresham if the line of credit could be used to finance SAVC's station, and Mr. Gresham is not aware of the credit line ever being used for any investment purpose in the past. Nueva Vista Exh. 21 at 47-48, 79.

Mary Decker's January 17, 1986 Sworn Statement

33. In a sworn statement attached to SAVC's opposition to Nueva Vista's Petition to Reopen the Record and Enlarge Issues, filed January 21, 1986, Mary Decker stated:

> Since I believed that My son Oliver Heard, Jr. was willing and able to loan up to that sum [$3 to $4 million dollars] to SAVC himself, I did not need to see financial statements from any other investor to believe that funds for the project could be generated internally. I discuss financial matters with my son often and am aware of his financial resources . . ..

Nueva Vista Exh. 14 at 12. However, Ms. Decker stated at hearing that she had never seen her son's financial statements or bank books. Nor does she know how much cash he has in the bank at any given time. Tr. 1975-76. At the December hearing, when asked about her son's role in providing information to counsel, Ms. Decker answered "I don't have much time with my son. He is so busy that I can't even get him on the telephone. I rarely see him . . .." Tr. 260. At the June hearing, Ms. Decker said it was "[v]ery true" that she can't reach her son on the telephone and even had trouble reaching him about travel arrangments for the June hearing. Tr. 1976. At hearing Ms. Decker agreed that her business discussions with her son are very general. Tr. 1976. She said that the word "often" in the context of the January statement means that she meets with her son "several times a year, not every day." Tr. 1977.

34. Mary Decker's sworn statement continued:

> At that time, I also knew that Heard, Goggan & Blair was a very profitable firm and that Laurence Macon was a financially successful partner of Cox & Smith, a large San Antonio law firm. . ..

Nueva Vista Exh. 14 at 12. But Ms. Decker has never seen a financial statement for Heard, Goggan & Blair. Tr. 1980. Ms. Decker's knowledge of the firm's financial posture is based instead on what she has read about the firm's contracts in the newspaper and discussed informally with her son. Tr. 1977, 1980. At hearing, Ms. Decker was asked if her conversations with her son regarding the firm's finances have become more general as he has become less available to speak with her on the telephone. She answered "well, I don't know what you call general, I mean when he takes me and shows me some beautiful condominiums he has bought, and when he takes me somewhere else and shows me something else, is that general or is that specific?" Tr. 1981. Furthermore, Ms. Decker has never seen a balance sheet for either Lawrence Macon or his law firm, Cox & Smith. *Id.* She never asked Mr. Macon if he had the net liquid assets necessary to meet his pro rata contribution. Ms. Decker testified that she learned of the reputation of the firm in casual conversation. Tr. 1982.

Answers to Interrogatories Propounded by Televista

35. On August 16, 1985, Televista Corp., a former applicant in this proceeding propounded a series of interrogatories to SAVC. Nueva Vista Exh. 9. SAVC filed responses on September 5, 1985 and supplemental answers on October 25, 1985. Nueva Vista Exhs. 10 & 11. Robert Thompson testified that he, "being a lawyer, had suggested the answers really to all of these questions and discussed it with the client." Nueva Vista Exh. 22 at 45. Mr. Thompson said that he was "very concerned" that the questions be answered correctly. *Id.* at 46. Mary Decker certified both sets of answers as correct. Nueva Vista Exh. 10 at 4; SAVC Exh. 10 at 2.

36. Televista Interrogatory No. 9 asked SAVC to "[i]dentify each individual or entity participating in any manner in the formulation of Applicant's plans for financing the construction and operation of Applicant's proposed station." Nueva Vista Exh. 9 at 4. In its supplemental answers, SAVC responded as follows:

> The individuals and entities who have participated in the formulation of Applicant's plans for financing the construction and operation of Applicant's proposed station are the Applicant's principals (listed on SAVC's application, Exhibit 1-A, as amended on January 16, 1985) and Robert Thompson.

Nueva Vista Exh. 11 at 2. Televista Interrogatory No. 9 further asked "[w]ith respect to each individual or entity identified: (a) Did he/she/it play any role in securing or arranging for financing from a bank or other financial institution? If so, describe in detail the role he/she/it played in this regard." Nueva Vista Exh. 9 at 4. SAVC answered "No." Nueva Vista Exh. 11 at 2. As already noted, Oliver Heard testified he spoke with Rupert Gresham of Frost Bank to arrange financing before SAVC's application was filed. And, his direct testimony at the June hearing was that he has had reasonable assurance since at least November 27, 1984 that he could borrow his pro rata share from Frost Bank, and borrow to meet his loan obligations to other shareholders, based in part on conversations "at that time" with Mr. Gresham. SAVC Exh. 12 at 2. [2]

37. Robert Thompson testified that, in answering Interrogatory No. 9, he, Mr. Macon and Ms. Decker focused on Mr. Heard and Mr. Macon's plan to obtain a joint loan from Frost Bank. " . . . but it appears to me that our thinking at the time would have been that since there was no final decision on a bank, a specific bank letter that, in fact, there had been no requirement for answering that, yes." Nueva Vista Exh. 22 at 33-34. Mary Decker testified that her answer to Interrogatory No. 9 would still be "no" today, as "we had not secured or arranged for financing." Tr. 1967.

38. Televista Interrogatory No. 10 asks "[w]ith regard to the Applicant's plan for financing the construction and operation of the proposed station, identify the principal(s) who were involved in assembling the documentation necessary to establish the Applicant's financial qualifications." Nueva Vista Exh. 9 at 4-5. In its supplemental answers, SAVC identified Mary Decker and R. Laurence Macon as the persons involved in such document assembly. Nueva Vista Exh. 11 at 3. It is undisputed, however, that no documentation was assembled in connection with SAVC's financial qualifications other than the application itself. Nueva Vista Exh. 14 at 7-8; Nueva Vista Exh. 14 at 14; Nueva Vista Exh. 16 at 1. Further, SAVC's Partial Opposition to Notification of Witnesses, filed December 3, 1985, expressly stated that "Macon's 'participation' has been limited to serving SAVC as its local counsel – for which he has been compensated." Nueva Vista Exh. 12 at 3-4. SAVC's Partial Opposition also claimed: "Nueva Vista is flatly wrong in implying that Macon had any substantive role in establishing SAVC's financial qualifications . . .." and that "Macon's 'participation' in the threshold formulation of SAVC's financial plan was equivalent to the participation of every other investor." Nueva Vista Exh. 12 at 4 at n. 7. And Mary Decker testified at the June hearing that she assembled no documents in connection with her financial certification. Tr. 1935-36, 1963. Ms. Decker was questioned at hearing about whether she thought of telling Thompson she assembled no documents. She answered:

> I think he explained that [to] me, I wish that word "assembled" weren't used because that is what is so confusing and I think at the beginning I said that, and he said no, it doesn't mean that, it means you have fed information on what you know, you and Larry Macon, and this is how I am assembling this document.

Tr. 1962. Ms. Decker testified at her May 1986 deposition that SAVC's answer to Interrogatory No. 10 is "[m]aybe misleading." Tr. 1969. In contrast, in her January 17, 1986 sworn statement, Mary Decker claimed SAVC's response to Interrogatory No. 10 "has always been a truthful answer" because she and Macon were the two principals who reviewed and assembled the November 1984 application itself. Nueva Vista Exh. 14 at 14.

39. Interrogatory No. 14 asked "[w]ith regard to the Applicant's plan for financing the construction and operation of the proposed station identify the principals who were involved in preparing the Applicant's estimate of: (a) the cost of construction of the station; and (b) the cost of operating the station for three months, assuming no income." Nueva Vista Exh. 9 at 6-7. In response, SAVC again identified Mary Decker and R. Laurence Macon. Nueva Vista Exh. 11 at 3. However, neither of these SAVC principals prepared any estimates. Their role was limited to being given an oral estimate by counsel. Nueva Vista Exh. 14 at 2; Nueva Vista Exh. 22 at 47; Tr. 261, 389, 2023. Mr. Macon was questioned at the December hearing session as to whether he had any role in estimating costs. He answered, "No. Absolutely not." Tr. 389. And, as noted above, SAVC represented in its Partial Opposition that Mr. Macon's participation in the applicant's affairs had been "limited" to serving as local counsel.

40. But in her sworn affidavit of January 17, 1986, Mary Decker stated that SAVC's answer to Interrogatory No. 14 was truthful because Ms. Decker and Mr. Macon were the only principals "who assisted Mr. Thompson in assembling the application." Nueva Vista Exh. 14 at 14. Mr. Thompson testified that Mr. Macon and Ms. Decker "understood my answer to the question and why I believed it was a truthful answer and why they were satisfied to accept that truthful answer." Nueva Vista Exh. 22 at 48.

41. Televista Interrogatory No. 15 asked "[i]f any active principal is not financing his or her interest in the Applicant through his or her personal savings or by a

loan from a public lending institution, such as a bank or loan company, with regard to that principal state: (a) the source of the financing; (b) the amount of the financing; (c) the terms and conditions of the financing; and (d) the identity of the person or entity who arranged for the financing." Nueva Vista Exh. 9 at 7. SAVC answered Interrogatory No. 15 "N/A" (i.e. "not applicable"). Nueva Vista Exh. 10 at 3. However, under SAVC's purported financial plan of November 1984, Mr. Decker, Mr. Bustamante, Ms. Romo and Ms. Jones all intended to finance their pro rata share of expenses through joint loans from Mr. Macon and Mr. Heard. SAVC Exh. 9 at 1-2; SAVC Exh. 10 at 1-2; SAVC Exh. 11 at 1-2; Tr. 2210.

42. Concerning Interrogatory No. 15, Ms. Decker testified that "he [Robert Thompson] said the more you give them the more trouble you get into all back and forth. I know that attorneys operate that way, so I accepted it. So I would probably answer it today the same way, yes." Tr. 1957-59.

43. Finally, Televista Interrogatory No. 16 sought the following information: "If any active principal of the Applicant is financing his or her interest in the Applicant by a loan from a bank or other lending institution, state whether (a) the principal negotiated the loan . . .." Nueva Vista Exh. 9 at 7. SAVC answered yes. Nueva Vista Exh. 10 at 3. However, while R. Laurence Macon testified he plans to rely on a loan from Frost Bank to finance his pro rata share of expenses, he also stated that he has not spoken with any banker concerning the possibility of such a loan. Tr. 2041. And Rupert Gresham testified at deposition that he and Mr. Macon have never discussed a loan to Mr. Macon to be used in connection with SAVC. Nueva Vista Exh. 21 at 25.

44. Televista Interrogatory No. 16(b) asked SAVC to state, for any active principal financing his or her interest by a loan from a bank or other lending institution, whether "security was required for the loan. If so, state whether such security was provided by the principal . . .." Nueva Vista Exh. 9 at 7. SAVC answered "no." Nueva Vista Exh. 10 at 3. Mr. Gresham testified, however, that he and Mr. Heard either discussed SAVC's stock and equipment as collateral, or it was "assumed" those items would be put up as collateral. Nueva Vista Exh. 21 at 25.

III. Diversification of Control of the Media of Mass Communication.

45. Neither *Vela Broadcasting* nor its principals own any interests in the mass media. Vela Exh. 4. *SAVC* owner, Oliver Heard, Jr., who owns 16.57% of the corporate equity and no voting shares of SAVC, owns 5% of Frontier Gulf Broadcasting. SAVC Exh. 2 at 1. Frontier Gulf holds a construction permit for Channel 62, St. Petersburg, Florida. *Id.* He also owns 5% and is a director of Frontier Southwest Broadcasting, Inc. which holds construction permits for LPTV channels in Little Rock, Arkansas and Austin, Texas. [3] Mr. Heard owns 2500 shares, a minority interest, in Clear Channel Communications and Clear Channel owns Broad Street Communications. These entities hold licenses for 6 AM stations in Hamden, Conn., New Orleans, La., Oklahoma City, and Tulsa, Oklahoma, and Port Arthur and San Antonio, Texas and 6 FM stations in the same communities, except Hamden, Conn. but including Austin, Texas. *Id.* Clear Channel also holds a construction permit for an LPTV station at Byran-College Station, Texas.

46. *TV 60* and its owners have no existing media interests. TV 60 Exh. 1 at 3. *Amistad* holds no media interests. Cynthia (Fitrah) Muhammad, who holds 10% of Amistad's equity, owns a 50% interest in and is vice president of Communicator Productions, Inc. a company which produces a syndicated public affairs program called "The Communicator" in Chicago, Illinois. Amistad Exhibit 3 at 1; Tr. 830; 845-48. The program is carried on WGCI and WBEE-FM, Chicago, Ill. Tr. 830. Astroline Company which holds 80% of Amistad's equity, owns a 70% limited partnership interest in Astroline Communications Company Limited Partnership which is the licensee of WHCT-TV, Channel 18, Hartford, Connecticut. Amistad Exh. 4. Astroline Company owns WHCT Management, Inc. and Astroline Company is also a 5% general partner in WHCT-TV. *Id.*

47. *Pro 60* has no mass media interests. Pro 60 Exh. 4. Maria Elena Torralva, who owns 50% of Pro 60 and is its president, holds 71 shares of the 11 million shares of United Television, Inc., the licensee of KMOL-TV in San Antonio. Tr. 1779-81.

48. *SABI* has no mass media ownership interests and those interests which its owners currently have will be divested. SABI Exh. 1 at 3-4; Exh. 2 at 5; Exh. 3 at 2; Exh. 4 at 3; Exh. 5 at 4. Nueva Vista has no mass media interests and the relationship Edward L. Gonzalez has with KENS-TV, San Antonio will be severed. Nueva Vista Exh. 6.

IV. Full-time Participation in Station Operation by Owners.

49. *Vela Broadcasting*, a general partnership, proposes that both of its general partners, Fred Vela and Velia Vela, would work full time (40 hours per week) at the station. Vela Exh. 1; Vela Exh. 3; Vela Exh. 6. Fred Vela would be the general manager and have overall managerial responsibility for the day-to-day operation of the station. Vela Exh. 3. Mr. Vela, who currently works for Vela Foods Enterprises, would resign from that company if a grant is made. Vela Exh. 3. Since 1981 Mr. Vela has lived in Leon Valley which is contiguous to San Antonio; before moving to Leon Valley he lived in San Antonio from 1973. Vela Exh. 2. Beginning in 1973 and continuing to the present, Mr. Vela has participated in a number of church, charitable, and political community activities in San Antonio. Vela Exh. 2 at 1-2. Mr. Vela is Hispanic. Vela Exh. 2 at 1.

50. Velia Vela claims she would be the station's director of public affairs programming and in this position she would be responsible for the production of public affairs and non-news programming. Vela Exh. 6. On August 8, 1985, when Vela filed its Integration Proposal and Diversification Statement, it represented that Velia Vela would work as director of public affairs for the station and that she would be responsible for implementing all marketing, advertising, and "public relations policies and policies [sic] for the station." She would also, it was claimed, ensure compliance of these policies by lower level employees. In answering interrogatories she did not claim she would have responsibility for program production or for the supervision of programming employees. Tr. 156-57, 158. When questioned about what she would do in her position as public affairs director, she explained that her primary responsibility would be marketing and advertising the station to outside groups. Tr. 146, 153. Her duties would include activities such as talking to local groups, setting up a newsletter regarding the television

station, and placing ads in newspapers and on radio promoting the station. Tr. 145, 146. Ms. Vela claims she would supervise employees who would produce programs. Tr. 167, 171. [4]

51. Ms. Vela lives in Leon Valley with her husband; before she moved there she had lived in San Antonio since she was born. Vela Exh. 5 at 3-4. The Vela's residence is within 100 yards of the San Antonio line and is within the proposed city grade contour. Vela Exh. 2 at 2. Ms. Vela, beginning in 1973, has participated in numerous religious, charitable, and educational activities in San Antonio. Vela Exh. 5 at 1-3. [5] Ms. Vela is Hispanic and female. Vela Exh. 5 at 1.

52. *SAVC* proposes that its three voting shareholders, Mary V. Decker, La Kita A. Jones and Sylvia Romo, would work full time (40 hours per week) at the station; their ownership represents 16.6% of the equity and purportedly all of the control. SAVC Exh. 1, Exh. 3, Exh. 4, Exh. 5. Ms. Decker would be the business manager and director of equal employment opportunity programs. SAVC Exh. 3. Her duties would include making general financial policy and developing and implementing the station's EEO policy. *Id.* Ms. Decker is a lifetime resident of San Antonio and she has participated in cultural, church and other organizations in San Antonio. *Id.* Ms. Decker is Hispanic and a woman. *Id.* Ms. Decker's equity ownership share is 10% but she owns approximately 60% of the voting stock. SAVC Exh. 1. She is president of SAVC and a director. *Id.*

53. Ms. Decker did not write her job description; rather, it was provided to her by SAVC's communications counsel. Tr. 347-48. While Ms. Decker plans to be a financial policymaker in the future, she testified she did nothing to help make the determination that SAVC is financially qualified. Tr. 264. She relied upon others to ensure the continued accuracy of SAVC's financial certification. Tr. 293-94. With respect to SAVC's pending application, she has had no responsibility for general financial policy. Tr. 345. She has no background in accounting and does not plan to do any accounting herself. Tr. 346-47. She thinks it is premature for her to decide exactly what she will be doing at the station. Tr. 348-49. With respect to her role as equal employment opportunity director, Ms. Decker has not made any plans beyond what is included in SAVC's FCC application (i.e., Form 396-A). Tr. 351. Further, Ms. Decker testified that while she would do "some hiring," there would be qualified people on the staff to perform that function. Tr. 299.

54. Ms. Decker is 66 years old and has no previous broadcast experience. SAVC Exh. 3, p. 1; Tr. 247-48. She has not worked for the past three years (Tr. 248), considers herself retired (Tr. 251), and presently is a Social Security annuitant (Tr. 249). She does not need to go back to work to support herself. Tr. 249.

55. La Kita A. Jones proposes to work as minority and women's affairs director and manager of community relations. SAVC Exh. 4. She would establish policy about the needs and problems of minority and women viewers, community groups and organizations and supervise the station's public service director. *Id.* Ms. Jones has lived in San Antonio since 1982 and she has participated in civic, church, and civil rights activities. *Id.* Ms. Jones is black and female. *Id.* Ms. Jones owns 2.2% of SAVC's equity and 13.33% of its voting stock. SAVC Exh. 1. She is a director and secretary of the company. *Id.*

56. Ms. Jones does not claim to have broadcast experience. SAVC's counsel decided what Ms. Jones' job description would be and prepared the statement in SAVC's exhibits. Tr. 514. Ms. Jones does not know whether she would have a staff working for her in her position as minority and women's affairs director. Tr. 548.

57. Ms. Jones' participation in SAVC is contingent on her ability to lend money to the corporation on a pro rata basis to meet construction costs. Tr. 534, 535, 538. Ms. Jones testified she cannot meet this obligation from her personal funds. Tr. 539.

58. Sylvia S. Romo proposes to work as the general manager of the station. SAVC Exh. 5. She would be responsible for initiating overall station program policy and she would supervise the news and program directors and legal affairs. *Id.* She is Hispanic and female. *Id.* Ms. Romo owns 26.67% of the voting stock which amount to 4.4% of the total outstanding corporate equity. SAVC Exh. 1. She is a director of the applicant. *Id.*

59. Ms. Romo has no broadcast experience. Tr. 558. She is a Certified Public Accountant who owns her own accounting firm where she works 40 hours or more per week. Tr. 557-58. Her accounting firm employs six persons and she makes all policy decisions for the business. SAVC Exh. 5 at 2. Ms. Romo has not indicated that she would stop her business activities. She did state that she intended to hire an experienced station manager to assist her with her duties. Tr. 566. She has not selected a programming format and has not made up a formal staffing plan. Tr. 565.

60. SAVC is a Texas corporation which has two classes of stock, voting and non-voting. The voting stockholders own 16.6% of the equity and the non-voting stockholders own 83.4%. As of the B cutoff date, SAVC was composed as follows:

Name	Office	Director	Percentage of Equity	Percentage of Votes
Mary V. Decker	President	Yes	10.00%	60.24%
La Kita Jones	Secretary	Yes	2.20%	13.25%
Sylvia Romo	None	Yes	4.40%	26.51%
R. Laurence Macon	None	No	16.57%	0%
Oliver S. Heard, Jr.	None	No	16.57%	0%
Albert G. Bustamante	None	No	16.57%	0%
Heard, Goggan & Blair	None	No	33.14%	0%
H. G. Wells, Esq.	None	No	.55%	0%

SAVC Exh. 1.

61. Relationships of the Principals. Mary Decker, an Hispanic female and owner of 60% of SAVC's voting stock, is the 66 year old mother of Oliver Heard, Jr. an attorney in San Antonio. SAVC Exh. 3 at 1; Tr. 246, 419. Mr. Heard is one-third owner of the law firm Heard, Goggan & Blair, which has the largest single block of SAVC's equity (33%). Tr. 419.

62. La Kita Jones, a 24-year old Black female and owner of 13% of SAVC's voting stock, is a clerical employee of Heard, Goggan & Blair. SAVC Exh. 4 at 1-2. Tr. 431, 509. Mr. Heard is in charge of employee compensation and other personnel matters for the law firm. Tr. 434. Ms. Jones did not meet Ms. Decker face-to-face until after SAVC's application was filed with the FCC. Tr. 521-23.

63. Sylvia Romo, an Hispanic female who owns the remainder of SAVC's voting stock (27%), was asked by Congressman Albert G. Bustamante to join SAVC. SAVC Exh. 5 at 1; Tr. 559. She did not know either Ms. Decker or Ms. Jones at the time she agreed to join the corporation. Tr. 568.

64. Oliver Heard was a campaign manager and treasurer for Mr. Bustamante when he ran for County Judge and was active in his congressional campaign. Tr. 424-25. The Congressman's wife is a member of the Heard, Goggan & Blair law firm and is a general partner with Oliver Heard in an investment company. Tr. 425. Laurence Macon has been a personal friend of Mr. Heard's since the late 1960s and the two have participated in many business deals together. Tr. 420-21. Mr. Macon has known Mr. Bustamante for 12 or 13 years and was his campaign manager when he ran for Congress. Tr. 380-81.

65. Robert Thompson, SAVC's counsel, is a close friend of Mr. Heard's wife (Tr. 449) and has known Mr. Heard since the time they attended "the university." Tr. 252. Mr. Thompson represents Mr. Heard in other cases before the FCC. Tr. 445. Mr. Heard advised his mother to follow Mr. Thompson's advice. Tr. 468.

66. Formation of SAVC. Oliver Heard was the first SAVC principal to learn about the opportunity to apply for Channel 60 and it was his idea to apply for it. Tr. 250, 426. He had given Mr. Thompson instructions to alert him to such opportunities because he was interested in participating in the media in San Antonio. Tr. 425-26. After learning of the opportunity from Mr. Thompson, Mr. Heard asked Mr. Bustamante and Mr. Macon to participate. Tr. 381, 425. Mr. Heard also asked his mother, Mary Decker, and La Kita Jones, his employee, to be participants. Tr. 251, 256, 514. Ms. Jones' equity position was determined and offered to her by Mr. Heard. Tr. 515.

67. Sylvia Romo joined SAVC in January 1985. Tr. 568. Mr. Bustamante approached Ms. Romo regarding her participation (Tr. 559) and recommended her to Mr. Heard and Mr. Macon (Tr. 551). Ms. Romo initially was offered the same percentage (2.2%) as Ms. Jones had. Tr. 584. She asked Mr. Thompson to double that percentage. Tr. 570, 584. This doubling was agreed to, but she does not know by whom. Tr. 585. Ms. Decker and Ms. Jones, the only two directors and voting stockholders before January, were not involved in determining Ms. Romo's equity percentage. Tr. 280, 551.

68. At the time Mr. Heard invited Ms. Decker and Ms. Jones to become principals of SAVC, he was aware of FCC comparative preferences for the participation of females and minorities. Tr. 440, 443, 451. Part of his motivation in selecting these individuals was that they had the necessary qualifications. Tr. 440, 451. Mr. Heard, along with Mr. Thompson, Mr. Macon and perhaps Ms. Bustamante came up with the idea of non-voting stock. Tr 452.

69. Financial Arrangements. Oliver Heard worked out retainer arrangments with Mr. Thompson's law firm and Heard, Goggan & Blair advanced the funds needed to retain Mr. Thompson. Tr. 252-54, 426. Mr. Heard also retained SAVC's consulting engineer. Tr. 426. Heard, Goggan & Blair paid the engineering fees in connection with SAVC's change in transmitter site in January 1985. Tr. 429. Mr. Heard recommended Gross National Bank in San Antonio as the depository for SAVC's funds. Tr. 431.

70. Mr. Heard personally lent the money to La Kita Jones which she used to make her capital contribution to the corporation. Tr. 435. This is an unsecured loan. Tr. 436. Ms. Jones is not obligated to pay the money back if SAVC's application is not granted. Tr. 527. Mr. Heard testified he was "pretty confident" that he talked to a bank officer at Gross Bank prior to his mother's going by to arrange a loan to pay her capital contribution. Tr. 437. Mr. Heard also steered Ms. Romo to a particular officer at Gross Bank. Tr. 583.

71. Prior to August 1985 neither Ms. Jones nor Ms. Decker made any financial contribution to SAVC. Tr. 322, 526. The non-voting stockholders, however, had put in their money previously. Tr. 326-27. It was the non-voting stockholders who made the determination as to when money should be contributed to the corporation. Tr. 327-28.

72. Mr. Heard was the person who arranged bank financing for construction of SAVC's station. Tr. 263, 457. Neither Ms. Decker, Ms. Jones nor Ms. Romo had any role in determining that SAVC was financially qualified. Tr. 264, 520, 575. Ms. Jones testified, "I have confidence in our non-voting stockholders that through them we could be financially qualified." Tr. 520. Mr. Heard assured his mother that there would be no problem financially. Tr. 264-65. The financial records for the corporation were kept at Mr. Heard's law firm until November 1985. Tr. 325, 541, 591. SAVC said in responses to interrogatories that Ms. Decker was involved in estimating costs, assembling documentation for SAVC's financing certification and in keeping SAVC's financial records. Tr. 361, 394. These responses were incorrect. Tr. 261, 264, 361-62.

73. Other Involvement of Non-Voting Stockholders. Mr. Heard's personal secretary, Joan St. Mary, helped prepare the initial FCC application. Tr. 517. Mr. Heard's office took care of local publication. Tr. 271. Mr. Heard was consulted by counsel regarding the first transmitter location proposed by SAVC. Tr. 466. When SAVC changed to a second site in January 1985, Mr. Heard discussed the move with his mother, Mr. Macon and Mr. Thompson. Tr. 467. He subsequently was told by Mr. Thompson that there was a problem with the second site. Tr. 469. It was Mr. Macon who hired the real estate agent who located SAVC's third site. Tr. 298, 408.

74. Personal Involvement of Voting Stockholders. From the time her son first made her aware of the opportunity to apply for Channel 60 up until the time SAVC's application was filed, Mary Decker's involvement in the project consisted of several telephone calls with Robert Thompson, SAVC's counsel. Tr. 259. She did not assist in locating the original transmitter site. Tr. 257-58. She has not spoken to the owner of the current site and does not know how much the land will cost. Tr. 368. She did not seek estimates for equipment. Tr. 261. She did nothing to

help make the determination that SAVC had sufficient funds available to permit it to certify to its financial qualifications. Tr. 264. In this connection, she relied upon her son and her knowledge of the other persons involved in the application. Tr. 264-65, 267.

75. Even though she is president and owner of a majority of the voting stock, Ms. Decker had nothing to do with negotiating the terms on which La Kita Jones and Sylvia Romo would participate in SAVC. Tr. 273, 280. The non-voting stockholders selected both Ms. Jones and Ms. Romo as participants. Tr. 256, 514-15, 559. Ms. Decker did not meet Ms. Romo until the day of the signing of the amendment reporting Ms. Romo's participation. Tr. 284.

76. As noted above, it was the non-voting stockholders, rather than Ms. Decker who made the determination as to when funds should be paid into the corporation. Tr. 327-28. Ms. Decker waited for Mr. Thompson or her son to tell her when to pay in her money. Tr. 322, 325, 328. Ms. Decker testified, "It looks like my son would have told me [to contribute] doesn't it." Tr. 328. Ms. Decker did not know at what point others made capital contributions. Tr. 323-25. Up to the time of the hearing, Ms. Decker had no responsibility for SAVC's financial policy. Tr. 345.

77. Ms. Decker did not know what percentage of the equity or voting stock she and the other voting stockholders were supposed to have. Tr. 307-09. Nor did she recognize mistakes in papers she signed which dealt with her percentage of the equity (Tr. 307-08, 311-12) or her personal capital contributions. Tr. 318-20, 334-35. Ms. Decker relied on Mr. Thompson to make sure the papers were correct. Tr. 312, 314. She testified, "I signed what I was supposed to sign." Tr. 280. When asked if she would change her mistaken representations if she had an opportunity to do so, Ms. Decker testified, "Yes. Now I would after all this, yes. Would be more careful and aware." Tr. 337.

78. La Kita Jones did not attend the initial meeting of SAVC where it was determined who was to be included in the corporation. Tr. 514-15. She did not meet Mary Decker face-to-face until after SAVC's application was filed with the FCC. Tr. 521-23. Mr. Heard told Ms. Jones, "I'd like for you to be involved . . .." Tr. 521. She was "very leery at first" but agreed to join SAVC after Heard said "trust me." Tr. 521.

79. Ms. Jones had no role in selecting the initial transmitter site, estimating costs of construction and operation or in making the determination that SAVC was financially qualified. Tr. 515, 518, 520. She does not know who was involved in making that determination. Tr. 521. In fact, Ms. Jones testified that she had no role in preparing the application except for providing her name and address and a statement that she had no media interests. Tr. 516.

80. Ms. Jones did not pay for her stock or make any other financial contribution to SAVC until late August 1985. Tr. 526. At that time, she advanced the money for her stock from her own account but was reimbursed through a loan she received from Mr. Heard. Tr. 526-27. It is Ms. Jones' understanding that she does not have to pay back the loan if SAVC's application is not granted. Tr. 527. At the time she paid for her stock in late August Ms. Jones did not know when or if others had paid for their stock. Tr. 528. Ms. Jones' participation in SAVC is dependent on her ability to lend money to the corporation to meet construction costs on a pro rata basis. Tr. 534, 535, 538. Ms. Jones testified she could not meet this obligation from her personal funds. Tr. 539.

81. Ms. Jones was not involved in the preparation of SAVC's amendment filed on the January 16, 1985 B cutoff date. Tr. 530. She did not review it before it was filed with the FCC. Tr. 529. She did not participate in the decision, reflected in the amendment, to change transmitter sites. Tr. 540. Rather, she was advised later by counsel that a change in sites had taken place. *Id.* Nor did Ms. Jones have any input into a later amendment by which SAVC changed to a third transmitter site. Tr. 543. With respect to the additional ownership interest she acquired as of the B cutoff date, this was something offered to her by Mr. Heard, rather than something she asked for. Tr. 529. She did not make the decisions regarding the division of voting and non-voting stock or the number of shares to beheld by each principal. Tr. 543. She did not vote on Ms. Romo's participation as a director and had no input into how much equity she would have. Tr. 551, 553.

82. Sylvia Romo had no role in preparing the amendment by which her participation was reported except for providing her name, address and the percentage of stock she would own. Tr. 570. Nor has she had any role in financial planning for construction of the station. Tr. 574-75. Ms. Romo has not personally reviewed and approved amendments to SAVC's application. Tr. 580. Nor has she had any role in arranging for changes in transmitter sites. Tr. 583. Although she is proposed as general manager, Ms. Romo has not decided on a program format or a staffing plan. Tr. 565.

83. *TV 60 Limited Partnership* has one general partner, Lydia Lawrence, who has a 10% ownership interest and one limited partner, Jonathan E. Byrd, who has a 90% ownership interest. Tv 60 Exh. 1 at 1. When TV 60 first filed its application, Mr. Byrd and Ms. Lawrence were both general partners. Mr. Byrd held 99% of the partnership's equity and Ms. Lawrence 1%. Tr. 610-11, 648-49, 651, 672. Lydia Lawrence proposes to be integrated into the day-to-day management of the station on a full-time basis (at least 40 hours per week) as director of religious programming and community affairs. TV 60 Exh. 1. She would ascertain the need for religious and public affairs programming, identify appropriate program formats, implement religious and community affairs programming, and supervise the staff for such programming. Ms. Lawrence would also administer the EEO program for the station. TV 60 Exh. 1 at 2.

84. Ms. Lawrence has always lived in San Antonio, except for one period of 21 months. TV 60 Exh. 1. She belongs to a local church, is a member of a homeowners association and the fellowship at her children's school, and she spends two hours a week working for the Moral Majority of Texas. TV 60 Exh. 1 at 3. Ms. Lawrence is Hispanic and female. TV 60 Exh. 1 at 1. She has no broadcast experience. Tr. 629, 686. Mr. Byrd does not propose to work at the station. TV 60 Exh. 1.

85. Mr. Byrd testified that the initial general partnership, in which he held 99% interest and Ms. Lawrence 1%, was a "matter of timing and convenience." Tr. 603. It allowed him to meet the A deadline, knowing that a change could be made in the applicant's structure prior to the B cutoff date after discussions between the principals. Tr. 603-04, 611, 628. Mr. Byrd testified that he wanted Ms. Lawrence to feel comfortable; he stated "I

literally try to give anybody that I might assist in this type of thing time to pray about it and know that this is what they feel the Lord would have them do." Tr. 604.

86. On December 31, 1984, Ms. Lawrence and Mr. Byrd entered into a Limited Partnership Agreement, creating the present TV 60 structure. An amendment to TV 60's application was filed with the Commission on January 15, 1985. Pro 60 Exh. 5; Tr. 656, 675.

87. When asked at hearing whose idea it was to reform the entity as a limited partnership, Ms. Lawrence answered it was Mr. Byrd's. Tr. 675. Ms. Lawrence also was asked if any other type of ownership structure was proposed, or if it was simply presented to her that the general partnership would change to a limited partnership. She answered, "|t|hat's correct, that it would change from a general partnership to a limited partnership." Tr. 697-98. No one ever explained to Ms. Lawrence the differences between a limited partnership and a corporation. Tr. 697. After receiving a copy of the Limited Partnership Agreement from counsel, Ms. Lawrence did not contact Mr. Byrd to discuss its terms or make any changes in it, before signing. Tr. 675-76. Ms. Byrd testified that it was counsel who "probably" recommended the limited partnership form. Tr. 622.

88. The Limited Partnership Agreement increased Ms. Lawrence's equity interest from 1% to 10%, and decreased Mr. Byrd's interest from 99% to 90%. Tr. 611, 656-57. Ms. Lawrence testified she did not initiate contact with Mr. Byrd to acquire this greater interest, nor did Mr. Byrd initiate contact with her. Rather, she said, it was done through counsel. Ms. Lawrence said she felt comfortable with 10% equity, and that the partners felt it would be an advantage in winning the station. Tr. 657-58. When questioned at hearing, however, Ms. Lawrence could not explain why she felt that this 10% interest would be an advantage to TV 60. Tr. 674.

89. Ms. Lawrence gave Mr. Byrd nothing in return for her new controlling interest as general partner, which she views as a gift. Tr. 658-59. At hearing, the TV 60 principals were questioned repeatedly as to why Mr. Byrd would surrender control of a business venture, in which his contribution could be over $2,500,000, to a stranger without any experience in the business. Mr. Byrd testified it was due to their "kinship" as Christians. Tr. 613.

90. Mr. Byrd said that it is his practice "to be able to find people who have a mutual interest or ability and help those people live up to the potential that they have," and this has served him well in business, served him well in serving the Lord, and helped him greatly in life. Tr. 620.

91. Ms. Lawrence testified at various times that: (a) Mr. Byrd decided that he did not want to leave his home and business in Indiana and move to San Antonio after all due to "physical problems" he was having (Tr. 658, 673, 675); (b) Mr. Byrd was confident in Ms. Lawrence, and trusted her to be the general partner (Tr. 658, 675); and (c) Mr. Byrd felt that he did not have the time to commit, or that it was too far for him to travel (Tr. 698).

92. When asked at hearing what Ms. Lawrence gave him in return for his becoming a passive investor with absolutely no control, Mr. Byrd answered that "she gave me her commitment that she would work full time in the station and that she . . . felt very comfortable in the areas of our specific concerns in overseeing the religious programming and community affairs aspects of the station so that our goals would be accomplished in serving the needs of the community." Tr. 612.

93. Paragraph F of TV 60's Limited Partnership Agreement provides that "|t|he term of the partnership shall begin on the date of the filing of the Certificate of Limited Partnership." Pro 60 Exh. 5 at 2. Ms. Lawrence was not aware of this provision at the time she signed the Limited Partnership Agreement, although she is aware that, under Texas law, a certificate of formation must be filed by a limited partnership with the Secretary of State of Texas. TV 60's certificate was not filed until August 8, 1985. Ms. Lawrence became aware of Paragraph F, through counsel, shortly after she signed the Agreement. Counsel filed the certificate for TV 60, but not at Ms. Lawrence's direction. Tr. 676-77.

94. Financial Arrangements. Mr. Byrd and Ms. Lawrence discussed the expected costs of constructing and operating their proposed station. Tr. 610, 653. Ms. Lawrence did not provide any input into the calculations regarding costs, but rather relied upon information received from Mr. Byrd and counsel. Tr. 653. When asked what her role was in assisting TV 60 to secure adequate financing, Ms. Lawrence answered, "I guess I would try to borrow my 1% from a lending institution or friends and if I couldn't draw from there, I would borrow from Mr. Jonathan Byrd." Tr. 655. She further testified that she did not, in fact, approach these institutions or friends, because her initial contribution was "such a minimal amount." Tr. 655.

95. At the time its application was filed, TV 60 relied on the personal assets of Mr. Byrd in certifying that it was financially qualified. Mr. Byrd testified that he has made a binding commitment to personally contribute up to $2.7 million to TV 60 under their Limited Partnership Agreement. Pro 60 Exh. 5 at 2; Tr. 640-41. Ms. Lawrence's share of the capital contribution to the limited partnership is $300,000, although she has contributed only $3,500 so far. The source of Ms. Lawrence's funds is two personal loans from Mr. Byrd. Tr. 678, 681, 695. She has executed two promissory notes, one for $2,000, payable to Mr. Byrd in 1990 at 10% interest, and one in the amount of $1,500, also payable to Mr. Byrd in 1990 at 10% interest. Tr. 595, 695. Her obligation to Mr. Byrd is unsecured, however. Tr. 682. In her signed answers to interrogatories, and at hearing, Ms. Lawrence testified that the interest on the first note is currently due but unpaid. Tr. 679-81. However, on redirect examination at hearing she testified that, based on her review of the note during the afternoon recess, the interest on the $2,000 note was not in fact due for five years. Tr. 708. Ms. Lawrence will try to finance her remaining obligation from lending institutions, although she "might get an inheritance." Tr. 695.

96. Partners' Involvement in Application. Mr. Byrd retained TV 60's communications counsel, who had previously represented Mr. Byrd's Minneapolis station. The two had a continuing relationship. Mr. Byrd had Ms. Lawrence talk to counsel on the telephone to determine her "comfort level" with him, but doubts Ms. Lawrence had much contact with counsel during the time he was still a general partner. Tr. 605, 607. Ms. Lawrence testified she had confidence in Mr. Byrd's selection of counsel. Tr. 670.

97. Counsel selected TV 60's antenna site, at Mr. Byrd's direction. Tr. 609-10. Mr. Byrd believes that counsel also hired the engineer who prepared the technical portion of TV-60's application. Tr. 607. The particular engineer who worked on TV 60's application also had done some work for Mr. Byrd's Minneapolis station. Tr. 607. Ms. Lawrence

had no part in retaining the engineer (Tr. 653), has never spoken to him (Tr. 667) and does not even know his name. *Id.*

98. Mr. Byrd filled out the information in TV 60's original application with counsel, and signed it on behalf of the applicant. Tr. 606. Ms. Lawrence had no role in preparing the application aside from providing personal information. She received a copy of the completed, typewritten application with Mr. Byrd's signature on November 21, 1984. Tr. 652-53. At hearing, Ms. Lawrence could not state a single decision she had made regarding TV 60's original application before it was file, except to join it as a 1% partner. Tr. 655.

99. Mr. Byrd testified that he has had no contact with the engineering firm since TV 60 filed its application, although he believes that he saw an invoice for their services. Tr. 608. He has had contact with legal counsel since that time, as they have an ongoing relationship concerning other matters. However, Mr. Byrd said their contact concerning the San Antonio application has been limited to a phone call or calls about hearing dates and the need for him to appear at hearing. Tr. 608-09.

100. Mr. Byrd has been reimbursed by TV 60 for the funds he personally expended for legal fees and engineering costs as a general partner. Because of the extent of his personal contribution to TV 60 (90%) and his previously described loans to Ms. Lawrence, Mr. Byrd is essentially reimbursing himself. Tr. 639-40.

101. TV 60's B cutoff date amendment reported that Ms. lawrence would be in charge of the proposed station's EEO program. Ms. lawrence guesses that her counsel put her in charge of it. She did not volunteer for the position, nor did she discuss it with Mr. Byrd. Tr. 666. Ms. Lawrence played no role in preparing the EEO program statement in TV 60's original application. Tr. 653. The amendment also provides for auxiliary power at the station. Ms. Lawrence said that she thinks she saw this in the amendment, although it was not her decision to include it; she imagines it was counsel's decision. Tr. 667.

102. Since becoming the sole general partner Ms. Lawrence has done nothing to assure herself that Mr. Byrd actually has the personal funds to construct TV 60's proposed station. Ms. Lawrence testified that she trusts Mr. Byrd's representations and the advice of her pastor that this is true. Tr. 705-06. Nor has Ms. Lawrence done anything since becoming general partner to assure herself that the proposed station's transmitter site is still available. She relies on counsel's representations that it is. Tr. 706-07.

103. *Amistad Communications* is a limited partnership with two equal general partners, Lesvia Guerra-Cox and Cynthia (Fitrah) Muhammad, who each own 10% of the equity and one limited partner, Astroline Company, which holds 80% of the equity. Amistad Exh. 1 at 1; Pro 60 Exh. 6 at 3. Ms. Guerra-Cox would work full time (40 hours per week) as the station's general manager. She would oversee day-to-day operations of the station, coordination of management and operation policies, and supervision of the marketing, promotional and advertising work of the station. Amistad Exh. 2 at 2.

104. From March 1983 through July 1983 Ms. Guerra-Cox worked at KLRN/KLRU-TV (PBS) in San Antonio. She was director of public information for the stations, and her duties included responsiblity for the promotion and publicity of all programming for the stations. From July 1983 through October 1984, she worked at KMOL-TV, TV4, Navarro at St. Mary's Texas. Amistad Exh. 2 at 1. She was director of marketing, advertising and promotion, and her duties included responsibility for the station's marketing, advertising, publicity and promotion work. *Id.*

105. Ms. Guerra-Cox has lived in San Antonio for one and one-half years and is Hispanic and female. Amistad Exh. 2 at 1. Ms. Guerra-Cox has been involved in Hispanas Unidas as a volunteer speaker and moderator, and with the Coalition for Families, Youth and Children as a volunteer. She did volunteer promotion and public relations work for the Coalition's "Latchkey Conference" in April 1985 and helped with the Coalition's brochure. Ms. Guerra-Cox also did volunteer work for the Department of Human Resources, City of San Antonio. Amistad Exh. 2 at 2.

106. Ms. Muhammad proposes to work full time, a minimum of 40 hours per week, as the station's program director. Her responsibilities would include supervision over and selection of the station's programming and monitoring the day-to-day operations of the station with respect to programming. She would hire and fire employees in the programming department and establish a budget for the department. Amistad Exh. 3 at 2.

107. Ms. Muhammad is a black female. She currently does not reside in San Antonio but she will relocate within three months if Amistad is granted a construction permit. Amistad Exh. 3 at 1.

108. Ms. Muhammad has served as vice president of Communicator Productions, Inc., and helped to produce a syndicated public affairs program called "The Communicator," which airs on Stations WGCI(FM) and WBEE(FM) in Chicago, Illinois. Amistad Exh. 3 at 1.

109. The Limited Partnership Agreement of Amistad provides that the initial capital contribution of Ms. Guerra-Cox and Ms. Muhammad will be $2,000 each, while the initial contribution of Astroline will be $16,000. Pro 60 Exh. 6 at 3. This money is to be used to establish the partnership's capital position and the partnership account; and all business expenses, including rents, fees, mortgages, taxes and other expenses shall be payable from the partnership account. The Limited Partnership Agreement does not expressly obligate the limited partner to make any additional capital contributions (Pro 60 Exh. 6 at 3), and Amistad's Certificate of Limited Partnership expressly provides that the limited partner had not agreed to make additional contributions at the time the Certificate was filed. Pro 60 Exh. 7 at 2. However, Astroline will share in 80% of the proposed station's profits. Pro 60 Exh. 6 at 3-4; Pro 60 Exh. 7 at 2. Ms. Guerra-Cox testified that Astroline's 80% equity interest is based on the fact that it contributed 80% of the initial capital. Tr. 783.

110. Amistad currently has outstanding debts, and requires additional capital contributions. Tr. 769-70. The partnership spent all of the initial capital by the time the Limited Partnership Agreement was executed, mostly in payment of legal fees. No additional contributions had been made as of the time of the December 1985 hearing, and neither the general partners nor the limited partner had made any loans to Amistad. Tr. 767. When asked what would happen if Astroline refused to make its share of additional contributions, Ms. Guerra-Cox answered she would have to rely on counsel's advice, but that the general partners would be liable to make the contributions themselves. Tr. 770.

111. *Pro 60* is a corporation with two stockholders, Maria Elena Torralva and Maria Raquel Oliva, who each own 500 shares of common stock. Pro 60 Exh. 1 at 1. Ms.

Torralva is a director and president of Pro 60 and she proposes to work full time (40 hours per week) as the general manager of the station. Pro 60 Exh. 2 at 6. She will exercise overall supervision of all facets of management and operation of the station. *Id.* Ms. Torralva has lived in San Antonio all her life and she is very active in local civic affairs. Pro 60 Exh. 2 at 1-4. Ms. Torralva has worked at San Antonio station KMOL-TV from 1975 to 1984. She has worked in both on-air positions and off-air management positions. Pro 60 Exh. 2 at 4-5. Ms. Torralva is Hispanic and female. Pro 60 Exh. 2 at 1.

112. Ms. Oliva is vice president, treasurer and a director and she proposes to work full time (40 hours per week) as station manager. Pro 60 Exh. 1 and Exh. 3. She will exercise authority over day-to-day station operations and all administrative matters. Pro 60 Exh. 3 at 3.[6] Ms. Oliva has lived in San Antonio for 12 years and she has been very active in civic affairs. Pro 60 Exh. 3 at 1-2. She is Hispanic and female. *Id.* Ms. Oliva has no broadcast experience.

113. Ms. Torralva testified that she decided to file for Channel 60 with Ms. Oliva in very early August 1984. Tr. 1784. Pro 60 was formed as a corporation five months later on January 9, 1985 by the applicant's communications counsel in Washington, D. C. Tr. 1787, 1797. Pro 60 was not a corporation when it initially filed for Channel 60 and Ms. Torralva stated that before January 9 she and Ms. Oliva had only a "strong oral agreement." Tr. 1786. Ms. Torralva testified that neither she nor Ms. Oliva signed subscription agreements or paid for their stock until August 7, 1985. Tr. 1789.

114. Ms. Oliva testified that Pro 60 has an "Investor Group" which has agreed to finance the station. Tr. 1814, 1832. The "Investor Group" is not a financial institution. Tr. 1833. Stock ownership by the Investor Group has been discussed but not agreed upon. Tr. 1816. Ms. Oliva stated that no agreement exists under which others would acquire equity in the station. Tr. 1816-17, 1831-33.

115. *San Antonio Broadcasting, Inc. (or SABI)* has four voting or Class A stockholders, each of whom would work at the station on a full-time (40 hours per week) basis. Junko Perez owns or has subscribed to 52% of the voting shares and she is vice president, chairman of the board, and a director of the applicant.[7] SABI Exhs. 1 and 3. Ms. Perez would be the public affairs director for the station. SABI Exh. 3. She would have day-to-day responsiblity for supervising production of public affairs programming and the development and coordination of public affairs activities. *Id.* Ms. Perez has lived in San Antonio since July 1983 and beginning in 1984 she became an organizer of the Japanese American Society in San Antonio. SABI Exh. 3 at 1 and 2. Ms. Perez is Asian-American and female. SABI Exh. 3 at 1.

116. Blanquita Cullum owns or has subscribed to 28% of the voting shares and she is president and a director of the applicant. SABI Exh. 2. She would be the general manager of the station and in that position would have day-to-day responsiblity for all major decisions made at the station. *Id.* Ms. Cullum has lived in San Antonio since 1972. *Id.* She participates in a wide selection of community activities. SABI Exh. 2 at 4. Ms. Cullum began working as a broadcaster in San Antonio in 1972. SABI Exh. 2 at 3. During that time she has worked in on-air and management positions in both radio and television. SABI Exh. 2 at 1-3. Ms. Cullum is Hispanic and female. SABI Exh. 2 at 1.

117. Elva Quijano owns or has subscribed to 16% of the Class A voting shares and she is treasurer and a director of San Antonio Broadcasting. SABI Exh. 4. Ms. Quijano proposes to work as the station's business manager. *Id.* She would be responsible for supervising the accounting and bookkeeping functions at the station. *Id.* Ms. Quijano would work closely with the sales manager on matters involving the accounts receivable. *Id.* Ms. Quijano has lived in San Antonio since 1932 and she has participated in activities in the community. SABI Exh. 4 at 1 and 2. She is Hispanic and female. SABI Exh. 4 at 1.

118. Deborah Crawford owns or has subscribed to 4% of the Class A voting shares and she is a director and secretary of San Antonio Broadcasting. SABI Exh. 5 at 1. Ms. Crawford proposes to work as the station's news director and in that capacity she would supervise the news department. *Id.* She would "oversee" news gathering and airing of news programming. *Id.* Ms. Crawford has, except for about one year, lived in San Antonio all her life and she has been very active in local civic affairs. *Id.* From 1972 to 1978, she was the public affairs director at KMOL-TV, San Antonio. *Id.* Ms. Crawford is black and female. *Id.*

119. All four SABI voting shareholders have entered into employment contracts with the corporation, in which each principal contracts to remain in her proposed management position for at least one year after SABI begins broadcasting on Channel 60. SABI Exh. 13 at 1-4. Ms. Perez said the four shareholders judged that employment contracts were necessary as "protection" for the company. Tr. 1698. George Tejadilla, SABI organizer, testified that he advised the principals to enter these contracts, but that he did not come up with the one year time period. Tr. 1730-32. He explained that the contract alerts the voting shareholders that "[t]he process of applying for a TV license is a very serious one," and commits them for a year in the application process so they will not drop out and thereby do "irreparable damage" to SABI's integration proposal. Tr. 1730. Mr. Tejadilla recognized that a key management person, leaving after just one year, could also do irreparable damage, but said that "short of involuntary servitude and compelling them to stay at their station, I am not sure what else you can do. They are free to do whatever they want to do." Tr. 1731. Ms. Crawford testified that the contractual term was only one year "in case there was some desire on my part to leave for any reason, another city, whatever, that I would be committed to that year, but after that year, then it would be my choice." Tr. 1559. She said that if a principal chooses to leave her management position after the one year term, she will not lose her SABI stock. *Id.*

120. Formation. SABI was organized by George Tejadilla, a California resident who learned of Channel 60's availability in late May 1984. He relocated to San Antonio and "began recruiting" to form an applicant. Tr. 1701-02. He did not want to become a part of the applicant himself because as a non-resident his participation would "jeopardize the credibility" of the applicant. Tr. 1704. Mr. Tejadilla said he acted, at least in part, on his own behalf when he recruited the persons who later joined SABI's application, none of whom he had previously known. Mr. Tejadilla saw himself as a consultant to the group he was assembling, although he recognized the decision to enter into a consulting agreement would ultimately be the group's. Tr. 1703-04. His own memorable analogy is that "I see this as an up-scale and professional version of the kid who runs up to your car

while you are waiting at the light and wipes off the windshield and then sees if you are interested in paying him for that service." Tr. 1724-25. Mr. Tejadilla had no broadcast experience, but felt he could offer his services as a consultant by making information available, recruiting persons and bringing together a team, finding investors for the team and retaining local and FCC counsel. Tr. 1704.

121. Of the current SABI principals, Ms. Crawford and Ms. Perez were the first who agreed to join the applicant Mr. Tejadilla was putting together. Neither had met him before. Tr. 1705. In August 1984 Mr. Tejadilla contacted Ms. Crawford about an earlier group he was attempting to assemble, which never materialized. Tr. 1514, 1516-17, 1710. Mr. Tejadilla telephoned her again at about the beginning of November to recruit her for a restructured group. Tr. 1526-27.

122. Mr. Tejadilla contacted Ms. Perez through her husband, and met with them at their home on November 16, 1984. Tr. 1660-61, 1739-41, 1758. Mr. Tejadilla testified he went to Ms. Perez because he was seeking an Asian female, active in community affairs with management experience. Tr. 1745. He said Ms. Perez verbally agreed to participate in the application at that initial meeting. Tr. 1739-41. Mr. Tejadilla was "convinced" that Ms. Perez would be a voting shareholder, although her equity position would be up to her. He said she could have had up to 25% ownership interest. Tr. 1741-42.

123. Mr. Tejadilla, Ms. Perez and Mr. Perez met with Gary Cain, the president of Sunbelt Tectonics, at Ms. Perez's home sometime between November 16 and November 20, 1984. Tr. 1665-67, 1745-48. It was Mr. Perez who recommended that Mr. Tejadilla get in touch with Sunbelt. Tr. 1719. Mr. Perez testified that the "actual business talk was going on between Tejadilla and the president of Sunbelt Tectonics." Tr. 1667-68. Mr. Tejadilla told the president of Sunbelt that up to 75% of the corporation's equity was available for investment, a figure which Mr. Tejadilla and the applicant's FCC counsel, not Ms. Crawford and Ms. Perez, came up with. Tr. 1715. Mr. Tejadilla testified that Sunbelt agreed "in principle" to join the application at that time. Tr. 1747.

124. SABI's By-laws and Articles of Incorporation were prepared before the corporation's organizational meeting on November 24, and the Articles of Incorporation were filed with the Secretary of State on November 20. Amistad Exh. 6; Tr. 1536, 1576, 1662, 1708. Ms. Crawford does not know who prepared the Articles and By-Laws or provided the information in them, but she considers their terms to be "standard" and assumes they were prepared by local counsel. Tr. 1532-36. Mr. Tejadilla testified it was he who requested the Articles be prepared, and supposes that he also came up with the name "San Antonio Broadcasting, Inc." Tr. 1708-09, 1713. Mr. Tejadilla further testified that both Ms. Crawford and Ms. Perez agreed to be initial directors, for purposes of filing the Articles. He said that both told him they would decide whether or not to actually go forward with their participation at the November 24th meeting. Tr. 1708-09. Ms. Crawford testified, however, that she does not recall a single conversation in which she gave permission to use her name, as an initial director, in the November 20th Articles of Incorporation. Tr. 1576-77.

125. Ms. Crawford and Ms. Perez first met each other at the November 24, 1984 organizational meeting arranged by Mr. Tejadilla. Tr. 1513, 1529, 1655. Mr. Tejadilla, Ms. Perez's husband, SABI's local counsel, and Gary Cain and William Conover of Sunbelt Tectonics were also present. Tr. 1530-31. Ms. Crawford decided to join the application at that time, and she became secretary of the corporation. Tr. 1531, 1551, 1655. Mr. Tejadilla offered Ms. Crawford positions as officer and director when he recruited her. Tr. 1551. It was also decided at the meeting that Ms. Crawford would have a 25% interest in the voting stock of SABI, and Ms. Perez the other 75% voting interest. Tr. 1513, 1536, 1656. Ms. Crawford does not recall if these numbers were suggested by someone other than Ms. Perez or herself. Tr. 1537. Ms. Crawford testified it was at this meeting that she and Ms. Perez decided to form a corporation rather than some other type of entity. Tr. 1532. However, as noted above, SABI was already incorporated at this time – with Ms. Crawford listed as a director. Tr. 1662, 1708.

126. Ms. Perez testified that she first saw a draft of SABI's application at the November 24 meeting. The draft had been prepared and sent by SABI's FCC counsel. Tr. 1656, 1659. She did not know who authorized counsel to prepare the application (Tr. 1659), although Mr. Tejadilla testified that it was he who authorized all counsel's actions before November 24. Tr. 1706-07. Ms. Crawford does not recall whether she saw the application that day, and is not sure whether she saw it before it was filed. She does remember being asked questions concerning the application. Tr. 1551-54. Ms. Crawford believes Mr. Tejadilla handled arrangements for the proposed station's transmitter location. Tr. 1555-56.

127. SABI's communications counsel and local counsel were both formally hired by Ms. Crawford and Ms. Perez at the November 24 meeting, upon Mr. Tejadilla's recommendations. Tr. 1530, 1548, 1658, 1743. Both attorneys had been doing work on behalf of the applicant before that time, however. For example, communications counsel had been advising Mr. Tejadilla regarding the qualifications of his recruits, and at Mr. Tejadilla's direction, phoning the recruits to answer their questions. Tr. 1707. FCC counsel also prepared a draft of SABI's application before the meeting (Tr. 1659), and, together with Mr. Tejadilla, determined the equity split between voting and non-voting shareholders. Tr. 1715. Ms. Crawford does not know who communications counsel was working for before November 24. Tr. 1584. Mr. Tejadilla testified that he hired FCC counsel before November 24, but did not pay him. Tr. 1707. Mr. Tejadilla also authorized local counsel to do the work he did before the November 24 meeting. Tr. 1713. SABI's local attorney also worked for Sunbelt, and it was the president of Sunbelt who suggested him to Mr. Tejadilla. Tr. 1575, 1756. Mr. Tejadilla then recommended the attorney to Ms. Crawford and Ms. Perez. Tr. 1743.

128. Mr. Tejadilla began recruiting Ms. Quijano and Ms. Cullum in August 1984. Tr. 1210, 1357, 1360. He found them by reading the daily newspaper, reviewing a directory of media personalities from the Chamber of Commerce, attending receptions and using other "resources." Tr. 1725. On January 12, 1985, Ms. Quijano and Ms. Cullum joined the application as voting shareholders of SABI. Ms. Quijano became a 16% voting shareholder; Ms. Cullum replaced Ms. Perez as president and became a 28% voting shareholder. Tr. 1226-27, 1363-64. Ms. Perez's voting interest dropped to 52% and Ms. Crawford's to 4%. SABI Exh. 1, pp. 1-2; Tr. 1692.

129. Ms. Perez and Ms. Crawford hired Mr. Tejadilla as a consultant to SABI on November 24. Tr. 1668. Mr. Tejadilla testified that Ms. Perez already hired him as a

consultant, "in a verbal sense," on November 16 when she first agreed to participate in the application. Tr. 1743. Ms. Perez testified, however, that at no time prior to November 24 did she hire Mr. Tejadilla to take any action. Ms. Perez was not aware of anyone else having hired Mr. Tejadilla to take the actions he did before the organizational meeting, and could not see any particular motive or incentive on his part. Tr. 1660-61.

130. Under the initial consulting agreement between Mr. Tejadilla and SABI, which he negotiated with Sunbelt, Mr. Tejadilla was to receive: (a) 15,000 shares of SABI stock, the par value of which he himself would determine later; (b) his out-of-pocket expenses, including the cost of his initial move to San Antonio and his taking time off from work (which he called his "finder's fee"); and (c) a certain amount of cash, depending on whether SABI was successful. Tr. 1716-18, 1724. He wanted stock because it is "more lucrative" than cash alone. Tr. 1716. Mr. Tejadilla testified that he also negotiated the original agreement, in "a manner of speaking," with Ms. Crawford and Ms. Perez. Tr. 1724. But at hearing Ms. Perez could not recall whether Mr. Tejadilla proposed the figure of 15,000 shares, whether he was to receive any money under the agreement, whether he would be compensated for his previous work or whether he would be compensated at all if SAVI was unsuccessful. She believes the agreement was written on November 21 by their local counsel. Tr. 1668-69.

131. Ms. Perez testified that under their first consulting agreement Mr. Tejadilla "was like a jack-of-all-trades. He was actually doing everything necessary to the new company . . .." Tr. 1672. Mr. Tejadilla testified that his duties under the original agreement included recruiting minorities and persons with media experience, locating investors and retaining local and FCC counsel, some of which he had already performed in "anticipation of finding a client." Tr. 1721-22. Ms. Crawford understood that "his job was to try to make this project fly." Tr. 1540.

132. Although the consulting agreement was revised on January 12, 1985, when Mr. Tejadilla came up with a proposal for a "raise," his duties have not changed. Tr. 1671-72, 1726. Ms. Perez said Mr. Tejadilla "continued to shoot all troubles . . . making all kinds of contacts including some of the contacts we had to make in Washington, D. C." Tr. 1673. She also said that "Whenever a problem occurred he did it [*i.e.*, took care of it] to a great extent." Tr. 1674. He has done research for FCC counsel's pleadings, reviewed FCC files and kept in constant touch with communications counsel. Tr. 1728-29. He also was constantly in touch with SABI's president and shareholders. Tr. 1674. Ms. Quijano said Mr. Tejadilla consults with SABI's attorneys, then meets with the voting shareholders to let them know "how the process is going." Tr. 1273. Ms. Cullum stated that, as president of SABI, she relies on Mr. Tejadilla for his "tremendous advice" and "particular insight." Tr. 1419.

133. At the time of the hearing Mr. Tejadilla worked for Sunbelt Tectonics, SABI's then only non-voting shareholder and 75% owner, serving "as the person who expedites real estate development projects." Tr. 1754. His employment with Sunbelt was his only source of income. Tr. 1761. Mr. Tejadilla has an employment contract, the term of which has been left open. [8] SABI Exh. 14; Tr. 1755.

134. Under their revised agreement Mr. Tejadilla provides consultation services to SABI in exchange for "reasonable" out of pocket expenses, not to exceed $5,000, and the right to receive 100,000 shares of Class B non-voting stock if it receives the broadcast license for Channel 60, "unless SABI's FCC counsel determines that an equity position of Mr. Tejadilla in SABI would tend to have an adverse effect on SABI's application under the diversification or integration criterion." SABI Exh. 1 at 2. In the event SABI's FCC counsel finds such an "adverse effect," Mr. Tejadilla would instead receive $90,000 from SABI in lieu of the 100,000 shares. SABI Exh. 1 at 3.

135. Mr. Tejadilla testified the determination as to whether he will receive shares or cash will be made by SABI's FCC counsel only after a license is granted to SABI and no appeal is possible, so that no decision has been made to date. Tr. 1728, 1758. In contrast, Ms. Perez testified that her understanding is that, if SABI is awarded a broadcast license, Mr. Tejadilla will in fact receive the shares. Tr. 1681. And Ms. Quijano testified that the four voting shareholders already have decided that Mr. Tejadilla will receive the 100,000 shares. She said Mr. Tejadilla was present when the decision was made, and "accepted." Tr. 1278-79. When questioned, Mr. Tejadilla could not answer what "adverse effect" to SABI's application meant in light of his testimony that the determination will be made only after a grant of license to SABI. Tr. 1765-66. And, as noted above, SABI's president testified that Mr. Tejadilla's rights with respect to the 100,000 shares should be treated as if the stock already were owned by him. Tr. 1429.

136. *Nueva Vista* proposes that its four original partners who now own voting stock would work at the station full time, more than 40 hours per week. Nueva Vista Exh. 1 at 1-2. David Davila, who owns 51% voting interest in the applicant, proposes to work as the general manager of the station. Nueva Vista Exh. 2 at 1. He would be in charge of all day-to-day operations, including programming, sales, promotion, technical operation and personnel management. *Id.* Mr. Davila has lived in San Antonio since 1977, except during 1982-84, and belongs to a church, coaches a Little League team, and belongs to a PTA. *Id.* [9] He is Hispanic. *Id.*

137. Nicasio Flores would work as the business manager and in that position he would supervise billing and collection, prepare financial statements, coordinate and approve expenditures, and be responsible for financial plans and policy. Nueva Vista Exh. 3 at 1; Tr. 1120-22. Mr. Flores' policy making role would be subject to the concurrence of Mr. Davila. Tr. 1114, 1115. His ability to make financial policy would be limited to sending his comments to the general manager. Tr. 1121, 1122. Mr. Flores holds a 15% interest. Nueva Vista Exh. 1. Mr. Flores has lived in San Antonio since 1980 and he has participated in local civic activities. Nueva Vista Exh. 3 at 2-3. He is Hispanic. *Id.*

138. Edward L. Gonzalez holds a 15% interest in Nueva Vista. Nueva Vista Exh. 1 at 2. He proposes to work as news director at the station. Nueva Vista Exh. 4 at 1. In that position, he would supervise all personnel in the news department and oversee the production of Nueva Vista's news programs. He would also work as an anchor on the news program. Nueva Vista Exh. 4 at 1. Mr. Davila would ultimately have the final say about news policy, hiring of news personnel, and sources of news. Tr. 1160, 1161, 1163, 1164, 1165. Mr. Gonzalez has lived in San Antonio since 1978 and he is Hispanic. Nueva Vista Exh. 4. He has been a television reporter and producer since 1971. Nueva Vista Exh. 4 at 1-2.

139. Maria N. Flores holds a 19% interest in Nueva Vista. Nueva Vista Exh. 1. Ms. Flores proposes to work as the station's public affairs director; in that position she would be the station's liaison with the community, produce a regular series of public affairs programs, and insure that the station fulfills the obligations of the Fairness Doctrine. Nueva Vista Exh. 5 at 1. Ms. Flores has lived in San Antonio since 1980; she is Hispanic and female. Ms. Flores has participated in activities related to her employment as a guidance counselor which appear to qualify as community or civic activities. Id.

140. Nueva Vista is a Texas corporation with two classes of common stock, Class A voting and Class B non-voting. There are 600 shares of Class A voting stock issued and outstanding. There are 400 shares of Class B non-voting stock issued and outstanding. Nueva Vista Exh. 1 at 1.

141. As of the B cutoff date for the San Antonio Channel 60 applications, Nueva Vista was a general partnership consisting of the following four individuals, with their respective partnership interests indicated:

Partner	*Partnership Interest*
David A. Davila	51
Nicasio O. Flores	15
Edward L. Gonzalez	15
Maria Norma Flores	19

Nueva Vista Exh. 1, p. 2. It was the understanding of the partners that David A. Davila, by virtue of his 51% ownership interest, would have voting control of the partnership. Tr. 965, 1051, 1100, 1145-48, 1193-94. In keeping with this understanding, Mr. Davila overruled his partners and had the final say when an impasse developed regarding the percentage of equity to be allotted to non-voting stockholders. Tr. 1100-01, 1138-39, 1146-47, 1149-50.

142. Nueva Vista filed its application on November 29, 1984. BPCT-841129LD, Form 301, MM Docket 85-132. Volume 1A. At Section II, page 2 it reported that the applicant was owned by three partners: David A. Davila, who owned 51%, Nicasio O. Flores, who owned 34%, and Edward Lozano Gonzalez, who owned 15%. The application did not indicate whether the partners held general or limited partnership interests. On January 16, 1985, the B cutoff date, Nueva Vista filed an amendment which added Maria Norma Flores' name to the list of partners; each partner was designated a general partner; and Mr. Nicasio was shown to have a 51% interest, Ms. Flores a 19% interest, and Mr. Flores and Mr. Gonzalez 15% each. *Id.* On August 5, 1986, Nueva Vista petitioned for leave to amend to report that on July 30, 1986 the partnership was dissolved and that they had assigned their application to Nueva Vista Productions, Inc., a Texas corporation. *Id.* Nueva Vista explained that the partners own all the voting stock in the same proportion as they had held partnership interests; and they all are officers and directors. Id. In the amendment, David A. Davila was designated president, Nicasio O. Flores was listed as vice president, Edward Gonzalez as secretary, and Maria Norma Flores as treasurer. Nueva Vista Exh. 1 at 1-2. Their equity interests were given as 30.6% for David A. Davila, 9% each for Nicasio O. Flores and Edward L. Gonzalez, and 11.4% for Maria Norma Flores. Id. Five non-voting stockholders hold the following equity interests: J. Brian McCall 8%, David B. McCall, Jr. 8%, David B. McCall, III 8%, Delwin W. Morton 8%, and Frank Lynch 8%. Id. The petition for leave to amend was unopposed and it was granted and the amendment was accepted on August 27, 1986. *Memorandum Opinion and Order*, FCC 85M-3351, released August 29, 1985 at 17. On August 8, 1985, Nueva Vista filed an "Integration and Diversification Statement" which reflected the stock ownership reported on August 5.

143. David Davila held a 51% interest from the outset because he was in a position to invest more money than the other owners, he spearheaded the project, and he did a lot of leg work. Tr. 987. The January 15, 1985 partnership agreement reflects the difference in partnership ownership in Article V and Article VI. SAVC Exh. 8 at 2. Those articles provide that contributions, profits and losses would be governed by the partnership ownership shares reported to the Commission. *Id.* The partnership agreement provided that the agreement would be governed by Texas law. *Id.* The partners claim they had a separate oral understanding that they would not have equal voting rights as is provided under the Texas Uniform Partnership Act; it was agreed that Mr. Davila would have voting control. Tr. 965, 1051, 1100, 1145-48, 1193-94. Mr. Davila later exercised that authority when he overruled the other partners in deciding how much equity would be given to the non-voting stockholders. Tr. 1100-01, 1138-39, 1146-47, 1149-50. Mr. Davila stated that it had always been the intention of the partners to form a corporation at some later time to insulate them from personal liability. Tr. 1063.

144. The Articles of Incorporation of Nueva Vista Productions, Inc. were filed with the State of Texas in March 1985, but Nueva Vista did not have its organizational meeting, accept stock subscriptions, issue stock or accept responsibility for the Nueva Vista application until July 30, 1985. SAVC Exh. 6 at 1; Nueva Vista Exh. 1 at 2-3. This was after an agreement was reached with the "Investor Group" (*i.e.*, the non-voting stockholders) as to the terms of their participation in the venture. The agreement with the Investor Group, entitled "Loan Agreement," was dated July 2, 1985, although it was not executed by the individuals comprising the Investor Group until a week or two later. Tr. 915. These changes in Nueva Vista's structure were reported in an amendment filed three days before the date for filing integration statements. *See Order*, FCC 85M-2928 (released July 24, 1985).

145. David B. McCall, III, the "Investor Group Representative" named in the Loan Agreement, testified that it was immaterial to him whether Nueva Vista's application was being prosecuted by a partnership or a corporation at the time he signed the Loan Agreement. Tr. 942. It was his understanding that the corporate form was not needed until the Investor Group was in place. Tr. 942-43. Mr. McCall knew when he read the recitations in the Loan Agreement – which speak of Nueva Vista as being a corporate applicant – that there would be a corporation with two classes of stock, even if the corporation had not been organized as of the date he signed. Tr. 942-43. Regardless of the fact the date on the Loan Agreement (July 2) and the date the corporation was organized (July 30) may not have been in proper sequence, Mr. McCall views any invalidity caused thereby to have been cured by the issuance of the stock the Investor Group was entitled to receive. Nueva Vista Exh. 1 at 2-3, 5; Tr. 948.

146. Prior to the organization of the corporation in July 1985, the persons listed above as partners contributed from their personal funds on a pro rata basis to meet the applicant's expenses. Additional funds were borrowed by

the partnership from a bank. Beginning in July 1985, expenses have been paid for by the corporation from funds borrowed from the five non-voting stockholders. Nueva Vista Exh. 1 at 3.

V. Comparative Coverage.

147. The following are the total areas and populations which each applicant will cover within its respective Grade B. contour:

Applicant	Area (Sq. Mi.)	Population
Vela	6,144	1,146,144
SAVC	11,871	1,243,455
TV 60 [10]	9,050	1,223,240
Amistad [10]	10,418	1,251,486
Pro 60 [10]	10,418	1,251,486
SABI 10	10,816	1,256,426
Nueva Vista	11,999	1,228,720

148. The following is an analysis of each applicant's uncommon Grade B service area according to the number of other commercial television services available:

Vela

Other Services	Area (Sq. Mi.)	Population
0	0	0
1	0	0
2	0	0
3	0	0
4	1,041	11,875
5 or more	805	34,345

TV 60

Other Services	Area (Sq. Mi.)	Population
0	0	0
1	0	0
2	0	0
3	846	6,762
4	2,185	30,667
5 or more	1,721	85,887

Amistad

Other Services	Area	Population
0	0	0
1	0	0
2	0	0
3	1,360	16,006
4	2,395	34,141
5 or more	2,366	101,415

SAVC

Other Services	Area	Population
0	1,603	20,534
1	1,883	37,727
2	318	1,913
3	739	10,609
4	1,338	10,031
5 or more	1,692	62,717

Pro 60

Other Services	Area	Population
0	0	0
1	0	0
2	0	0
3	1,360	16,006
4	2,395	34,141
5 or more	2,366	101,415

SABI

Other Services	Area	Population
0	0	0
1	0	0
2	0	0
3	1,489	16,502
4	2,516	35,996
5 or more	2,513	104,004

Nueva Vista

Other Services	Area	Population
0	1,822	21,388
1	1,968	38,149
2	336	1,981
3	761	10,696
4	1,316	9,810
5 or more	1,499	46,772

CONCLUSIONS

I. The Site Availability and Suitability Issues about the Proposals of TV 60 Limited Partnership, Amistad Communications of the Southwest, Pro 60 Communications and San Antonio Broadcasting.

149. Remaining for consideration are pleadings about the antenna site proposals of TV 60 Limited Partnership, Amistad Communications, Pro 60 Communications, and San Antonio Broadcasting. Following the initial hearing and close of the record, TV 60 and San Antonio Broadcasting requested leave to amend to designate new antenna sites. They had originally proposed locating on the existing KBUC tower. TV 60's and San Antonio Broadcasting's requests were denied and their amendments were rejected. *Memorandum Opinion and Order*, FCC 86M-1107, released March 28, 1986 at ¶s 4-9. Amistad and Pro 60 have also designated the KBUC site but, apparently, because they believe their attempts to designate new sites would be treated the same as TV 60's and San Antonio Broadcasting's proposals, they have sought vainly to remain at the same site.

150. TV 60 explained in its motion for leave to amend, filed December 24, 1985, that the KBUC site owner notified it, on December 13, 1985, that the space on the tower was no longer available. It is uncontested that the KBUC site owner told these four applicants in 1984 that it was willing to permit them to designate the KBUC tower as their antenna site with the understanding that one of the applicants for Channel 29, San Antonio and one for Channel 23, San Antonio also had the right to negotiate a lease for the same space. The owner of the site, TETCO, explained to them that its position with all potential lessees is that space will be made available to the first entity in a position to enter into a mutually acceptable agreement . . .. [P]ermission to specify the tower should not be construed to create any rights . . . or to

provide any assurances that space will be available when and if your client obtains a construction permit." Aside from the fact that these parties were unable to obtain any assurances" that the site would be available, it was likely that the Channel 29 proceeding would be completed long before this one since those applications had been filed 3 1/2 years earlier.

151. San Antonio Broadcasting and TV 60 request leave to file an appeal of the denial of their amendments to designate a new site under these circumstances; that request, in light of this order, is now moot. [11] They also request reconsideration of the ruling on their amendment.[12] Pro 60 and Amistad have not sought leave to designate a new site but they filed a joint statement, on April 16, 1986, in which they expressed their belief that they have a continuing right to designate the KBUC site and Pro 60 has filed two more statements," one on April 29, 1986 and the other on May 7, 1986. [13] In light of Pro 60 and Amistad's position about the site, Nueva Vista petitions to enlarge issues against them to determine whether they have an available and suitable site. [14] Nueva Vista also moves to dismiss the applications of the four applicants who have designated the KBUC antenna site on the grounds that their applications are patently defective. [15]

152. TV 60 reported that it lost the KBUC site on December 16, 1985. It explained that this occurred because the Channel 29 permittee had signed a lease for the tower. TV 60 also pointed out that "[t]here was room for only one television antenna on the KBUC tower" and that, therefore, "TV 60 can no longer be accommodated." On December 20, 1985, Pro 60 reported that it had been told on December 17, 1985 that space on the KBUC tower was no longer available and that it intended to specify a new site. On January 10, 1986, San Antonio Broadcasting reported the same information and stated that it would "specify new engineering as soon as possible." [16] On January 14, 1986, Amistad also reported the loss of the site and it stated that it was seeking an alternative site and would "as soon as possible" amend to designate a new site.

153. San Antonio Broadcasting in its request for appeal argues that reasonable assurance for an antenna site has "been held to exist under circumstances much more attenuated" than its arrangement for the KBUC site. TV 60 argues in its request for appeal "that although there was some risk that its site could be lost," it believed it had reasonable assurance because the odds were that the Channel 29 permittee would not be the Channel 29 applicant that had designated the KBUC site. TV 60 claims that the odds against the KBUC site being available were really no different than the ordinary case where a site might be sold or leased to an unknown entity before grant. TV 60 also maintains that if the Channel 29 applicant had reasonable assurance for the KBUC site, then it too should be found to have such assurance. San Antonio Broadcasting and TV 60 request reconsideration of the denial of their requests to designate a new site on the grounds that the decision is inconsistent with, among others, the Review Board's decisions in *Arizona Number One Radio, Inc.*, 103 F.C.C. 2d 550 (Review Board 1986) and *Mary S. Bohi*, 103 F.C.C. 2d 1008 (Review Board 1986).

154. Nueva Vista opposes the petitions for reconsideration on the ground that requests for reconsideration of interlocutory rulings are not allowed, citing Q1.106(a)(1) ("Petitions for reconsideration of other interlocutory actions will not be entertained."). In addition, Nueva Vista argues that the Board's determination about reasonable assurance for the sites in *Arizona Number One Radio* and *Mary Ann S. Bohi* do not lend any support to San Antonio Broadcasting and TV 60's claim. Nueva Vista urges that the applicants in *Bohi* had reasonable assurance at the outset and the four applicants who designated the KBUC site did not and that in *Arizona Number One Radio* the designated site was on federal land and the Bureau of Land Management would not give final authorization until the applicant received an FCC construction permit. In addition, Nueva Vista notes that, in those cases, there was no evident third party seeking the sole location, as is the case here. In any event, Nueva Vista points out that TETCO's leasing agent, BKT Corporation, was willing to give Nueva Vista an option which amounted to a right of first refusal if the Channels 29 and 23 applicants sought to use the available space before the Channel 60 proceeding was completed. Nueva Vista states that it did not designate the KBUC site, but the option offered was for 12 months and would have cost $100 and it was renewable for another 12 months with payment of another $100. It is Nueva Vista's position that, because the four applicants knew that at least two parties might claim the site before they could, reasonable assurance could only have been achieved by obtaining an option.

155. Nueva Vista also urges that TV 60 Limited Partnership, Amistad, San Antonio Broadcasting and Pro 60's applications should be dismissed or, alternatively, in the case of Amistad and Pro 60, which have not proposed a new site, that an issue be designated about their currently designated site's availability and suitability. Nueva Vista's April 3, 1986 motion to dismiss points out that these four applicants had conceded that they had no antenna site. Because they cannot establish good cause for designating a new site, Nueva Vista argues that their applications should be dismissed.

156. TV 60's response to Nueva Vista's request argues that good cause for designating a new site exists and that question should be reviewed by the Board before dismissal is granted. San Antonio Broadcasting's response asserts the same general argument. Pro 60 and Amistad respond that, contrary to their representations in December and January, they believe that they have reasonable assurance for use of the KBUC site. Pro 60 represents that, following its December 1985 filing, it "reached agreement" with TETCO "on the general terms of an option agreement." [17] But Pro 60 explained, on April 16, 1986, that final execution of the agreement had been delayed because TETCO's counsel had been out of town on business but that he was expected to return that day. Attached to the April 16 statement is a letter from TETCO to Pro 60, which appears to permit Pro 60 to designate the KBUC tower "if the parties enter into an option Agreement by April 21, 1986."

157. On April 29, 1986, Pro 60 filed another statement in which it represented that while it still had no final assurance that TETCO's site would be available, TETCO was still considering granting Pro 60 an option. [18] On May 7, 1986, Pro 60 informed the Commission that TETCO had agreed, on April 28, 1986, to sell the KBUC tower but that the new owner had indicated that it was willing to enter into an option agreement with Pro 60. [19]

158. On May 27, 1986, when no further statement or amendment had been filed by Pro 60 or Amistad about whether the KBUC tower was available, Nueva Vista submitted the engineering statement of E. Harold Munn,

Jr. which disputed their general claim that both Channel 29 and Pro 60 (or Amistad) could be accommodated on the KBUC tower. Mr. Munn claims that when Channel 29 locates on KBUC's tower, the tower will become unavailable and unsuitable for Channel 60's antenna. [20] Mr. Munn reviewed the KBUC tower structure specifications, which he obtained from the tower's manufacturer and Commission files. He found that Channel 29's antenna will be attached to all three faces of the tower, that the KBUC tower was designed for only one television antenna and that an added television antenna would require additional structural and wind load studies. Mr. Munn also believes that the existing conduits running up the tower probably could not accommodate Pro 60 and Amistad's waveguide.

159. Nueva Vista suggests that it might be possible to locate Channel 60's antenna on a lower position on the tower or perhaps composite antenna could be developed with Channel 29. But Nueva Vista points out that Pro 60 and Amistad have continued to maintain that they will locate in the same position as Channel 29 and that they have submitted no evidence that Channel 29 would delay construction or accommodate either one of them. In this regard, Nueva Vista explains that the president of Alamo Broadcasting, the licensee of Channel 29, advised Nueva Vista that Alamo has no intention of installing a composite antenna.

160. Pro 60's response to Nueva Vista's filing was a representation that it intended to sign a lease option agreement with the site's new owner within two weeks of June 11, 1986. [21] Pro 60 attaches a declaration from Paul Lansat who represents that he is executive vice president of International Communications Management. (ICM). Mr. Lansat explains that ICM, is "a broadcast tower management consultant company," and he claims that ICM has been hired by TK Communications, the new owner of the KBUC tower, to negotiate the use of available space on the tower. Mr. Lansat represents that Channel 29 will either move to the top of the tower to the spot now occupied by KBUC-FM or share a multiplex panel at the tower location which both Channel 29 and the applicants for Channel 60 have designated. On June 18, 1986, Amistad stated it was relying on Pro 60 to obtain an option. [22]

161. In a reply filed July 11, 1986, Nueva Vista pointed out that Alamo, Channel 29's permittee, has a lease/option agreement for its location (the option agreement was attached to Nueva Vista's reply) and that the tower owner has the right to lease space to another entity only if it does not interfere with Alamo's use. Nueva Vista urges that without a statement from Alamo it cannot be concluded that the situation is any different than when Amistad and Pro 60 notified the Commission, six months before, that Alamo had a lease and they could no longer locate on the KBUC tower. In this regard, Nueva Vista notes that while Mr. Lansat claims that there has been an agreement in principle, he has not submitted any evidence of the agreement. Nueva Vista also argues that it is inconceivable that the new licensee of KBUC-AM and FM, TK Communications, would relinquish the top spot on the tower to Alamo in order that Channel 60 can be accommodated. Nueva Vista points out that TK paid $15 million for the KBUC stations and its interest would not be served by giving up its tower position. Nueva Vista suggests that ICM is perhaps only trying to sell antenna assurance rights but not necessarily an existing available tower position. ICM is headed by Ronald Crider, Nueva Vista explains, who has promoted similar transactions in Miami and, more recently, in Tampa, Florida. *See Florida Broadcasting Co., Inc.*, 99 F.C.C. 2d 840 (Review Board 1984); *Arizona Number One Radio*, 103.F.C.C. 2d 550 (Review Board 1986).

162. In addition, Nueva Vista points out that Pro 60 and Amistad have not even responded to Mr. Munn's assessment that a load study would be necessary to establish that Channel 60 could be accommodated and that the space inside the tower is too small to accommodate both Channel 29's coaxial transmission line and Channel 60's waveguide. Finally, Nueva Vista points out that while Mr. Lansat represented there would be an agreement in two weeks, none has materialized.

163. Applicants will not be permitted to amend to a new site in Commission proceedings if they did not have reasonable assurance that the original site was available. *George Edward Gunter*, 60 Radio Reg. (P&F) 2d 1662, 1663 (1986). In 1984 when TV 60, Amistad, Pro 60, and San Antonio Broadcasting designated the tower owned by TETCO, the licensee of KBUC-FM, they represented that they had reasonable assurance from the tower owner. However, TETCO told the Channel 60 applicants that it had informed the applicants for San Antonio Channels 29 and 23 that they could use the single remaining space that could accommodate Channel 60's antenna, and that, therefore, it could not provide "any assurances" that the tower would be available. Moreover, at least TV 60 concedes that under those circumstances there was a risk. [23] In fact the risk was substantial since the applications for Channel 29 had been under consideration at the Commission for over 3 1/2 years when the Channel 60 applicants filed. In addition, Nueva Vista points out that risk could have been eliminated since TETCO was willing to provide an option for the nominal sum of $100 which would have assured that the tower position would have been available to the Channel 60 applicants if the Channel 29 proceeding concluded before this one.

164. TV 60 urges that it acted reasonably. In its view, the assurance it received is the same as any other applicant since it might happen in any case that unexpectedly the land might be sold or leased to someone else. Even if those "unexpected" events could not have been prevented, as it could have here by paying $100, TV 60's example is not analogous since the potential lease by the permittee of Channel 29 (or Channel 23) was not unknown and there was a reasonable likelihood that the interest of those applicants would be exercised long before this proceeding would be decided. "[A] mere possibility, assumption, or hope that the site will be available will not suffice." *Houston Family Television Ltd.*, FCC 85R-56, released July 10, 1985, at ¶5. *Alden Communications Corp.*, 102 F.C.C. 2d 518, 519 (Review Board 1985). [24] Section 73.3525(b) requires that post designation amendments be necessitated by events which the applicant could not reasonably have foreseen, such as loss of a site by condemnation, and that the amendment does not require an enlargement of the issues. None of the four applicants can claim that loss of the KBUC site could not have been foreseen. In addition, it is apparent that if Amistad and Pro 60 were to designate a change in their use of the KBUC tower, an issue would exist about the suitability of that tower for their antennas. Neither Amistad nor Pro 60 have even addressed the prima facie showing submitted by Nueva Vista in that regard; Nueva Vista's contentions are unrefuted.

165. Throughout the numerous pleadings on this matter, the parties who have designated the KBUC site have failed to establish that they initially had reasonable assurance. The good cause standard for engineering amendments cautions applicants to avoid the kind of risk evident here in order to insure that the Commission's processes will not be unnecessarily disrupted. Applicants who fail to heed the warning of §73.3525(b)(i) and (ii), do so at their peril. Changes in applicants' proposals are disruptive and time consuming: In this case, the parties had all possibility of using the KBUC site dissolve after joint engineering evidence had been submitted about the site in the hearing. Amistad and Pro 60 have refused for ten months to admit they still do not have reasonable assurance. Instead, they have promised that tomorrow they will demonstrate that they have reasonable assurance that the site is available. But the history of their representations shows that tomorrow has come and gone many times without the promised demonstration. They have not even responded to the serious engineering issues raised by Nueva Vista. And, since mid-June, there has been no word at all from Pro 60 or Almistad; they have left their proposals incomplete. Under these circumstances, it must be concluded that TV 60, Pro 60, Amistad, and San Antonio Broadcasting have been unable to meet the Commission's requirements for amending their tower sites. Each has been unable to demonstrate in a reasonable amount of time that the old site was or is available. The Commission restricts post-designation amendments through the good cause test and engineering-amendments are additionally restricted by §73.3525(b) in order to save the Commission's resources for those applicants that have timely established that they are qualified. The motion to dismiss filed by Nueva Vista will be granted.

II. San Antonio Video Corporation's May 16, 1986 Request to Add a Financial Issue Against Nueva Vista

166. On May 16, 1986, five months after the record was closed in this proceeding, SAVC petitioned to enlarge issues against Nueva Vista to determine whether Nueva Vista misrepresented in its application, filed on November 29, 1984, that it was financially qualified. SAVC stated it knew the facts which it alleges for "several months" but that the "recent failure" of settlement discussions "ripens the need" for presenting the issue. SAVC believes that Nueva Vista misrepresented that it was financially qualified in a B cutoff amendment. It forms this conclusion from hearing testimony which it claims establishes that Nueva Vista did not obtain financing for its proposal until six months after the B cutoff, on July 30, 1985. The testimony on which SAVC relies was given on December 12 and 13, 1985.

167. Nueva Vista maintains that SAVC's claim that it waited five months to file because of settlement negotiations is untruthful. It supports its claim by pointing out that no settlement discussions were held from December 1985 until April 7, 1986 and that fact is a matter represented by all parties in an April 7, 1986 joint filing to the presiding officer. Responding to the merits of SAVC's claim, Nueva Vista attaches a declaration from its president, David A. Davila. He states that Nueva Vista had a financial commitment which it obtained on January 10, 1985, five days before it certified its finances. (Before that time Nueva Vista had informed the Commission that it could not certify that it was financially qualified.) In addition, he represents that preceding that date the parties had sufficient funds on hand to meet the applicant's estimated $100,000 in hearing expenses. He explains that, until another investor was found in July 1985, the partners paid all expenses.

168. SAVC's request is inordinately late and without excuse. While the allegations of misrepresentation are serious, there is no evidence that Nueva Vista did not tell the truth. The transcript establishes that in July 1985 Nueva Vista found new investors to help defray the cost of the proceeding. But Mr. Davila explains that it could have proceeded without them. The motion to enlarge will be denied. [25]

III. San Antonio Video's Representations about Its Financial Qualifications.

169. In order to promote its application with the Commission, San Antonio Video has maintained that Mary V. Decker would make general financial policy for the station. She purportedly owns 60% of the voting rights and 10% of the equity in the applicant. In addition, she is president of the corporation and a director. In keeping with these roles, Ms. Decker has certified to and testified about the applicant's financial qualifications. Her son, Oliver S. Heard, Jr., and the law firm he owns one-third of, Heard, Goggan & Blair, have no voting rights but together own 49.7% of the equity. Mary Decker, who is Hispanic, has no evident reason for directing a business venture to construct and operate television station in San Antonio. She is 66 years old, has been retired for three years, and receives Social Security. In addition, she concedes that the whole proposal was the idea of her son, Oliver Heard.

170. When San Antonio Video answered interrogatories in this proceeding in September and October 1985, Mary Decker certified the answers and represented that she and Lawrence Macon assembled the documentation for establishing that San Antonio Video was financially qualified. (R. Lawrence Macon, who is a lawyer in a San Antonio firm and who frequently participates with Ms. Decker's son, Oliver Heard, in business ventures, owns a 16.7% equity interest and, like Mr. Heard, he has no voting rights.) She also certified that she, again along with Mr. Macon, prepared construction and operation estimates. It is clear that San Antonio Video was attempting to demonstrate that Mary Decker was actively involved in developing the financial plan for the applicant. In fact, there never has been any documentation for the financial plan and no considered estimate of the cost of operation and construction has ever been prepared. The nearest that San Antonio Video ever came to estimating costs was when it considered the general opinion of its Washington, D. C. counsel that to construct and operate a UHF television station in San Antonio would cost somewhere between 3 and 4 million dollars. Ms. Decker concedes that San Antonio Video's interrogatory response to the question about documentation of San Antonio Video's finances was misleading. It is equally apparent that San Antonio Video's response to interrogatories could not have been used as a truthful and reliable guide to understanding who prepared its financial proposal.

171. San Antonio Video's application was filed in November 1984. Mary Decker signed the application and certified that the applicant was financially qualified. She has testified that she understood what she needed to do to certify that sufficient net liquid assets were available;, she had a copy of the Form 301 instructions which specifi-

cally require that documentation be available to substantiate that determination. At the hearing held in December 1985, Ms. Decker said that it was San Antonio Video's plan to rely on pro rata contributions from all its stockholders. But, as Oliver Heard pointed out during the December hearing sessions, there was no firm plan and as far as he knew the plan was to proceed by conventional methods of debt financing. But, now after those statements were made, it is apparent that no one, let alone Ms. Decker, made the required analysis to establish that up to $4 million would be made available to San Antonio Video.

172. Ms. Decker, who the applicant claimed made that determination, could point to no effort on her part. She instead relied on her belief that her son, Oliver Heard, is a wealthy multi-millionaire and her additional belief that he would use that wealth to finance the proposal. Mr. Macon, who San Antonio Video represented assisted Ms. Decker in making financial determinations, denies that he had any part or took any steps to assure the applicant's financial qualifications.

173. In addition, in December 1985 it was evident that all of San Antonio Video's stockholders could not provide their pro rata share. Congressman Albert Bustamante, whose worth is a matter of public record, had an obligation to contribute 16.57% of the equity or over $650,000; his net liquid assets were no greater than $50,000. Later, in June 1986, at additional hearing sessions, Oliver Heard claimed that the principals had intended that he and Mr. Macon would lend money to Albert Bustamante and all other stockholders, except maybe Mr. Heard's law firm. But, that appears to be a scheme made up long after certification. When Ms. Decker was questioned about San Antonio Video's financial proposal at her deposition in May 1986 she did not mention Heard and Macon's plan to loan money to the stockholders. In her June 1986 testimony she said she must have forgotten. Mr. Heard said that in November 1984, before the application was filed, he talked with the Frost National Bank about lending money to him so he could lend to the stockholders. But the Frost Bank's commercial loan officer, Rupert Gresham, stated that no such discussions took place until November 1985 and then the bank was only asked to consider a possible loan to San Antonio Video, not to any individual stockholder.

174. The testimony of San Antonio Video's principals fails to support its contention that it had reasonable assurance for the needed $3 to $4 million in November 1984. The testimony establishes that Ms. Decker, Mr. Heard, Mr. Macon, LaKita Jones (also a stockholder) and Mr. Bustamante each had differing views of what was the financial plan. San Antonio Video's president, Mary Decker, concedes she did nothing called for in the Form 301 instructions before reaching her determination. She excuses her failure to provide complete answers to interrogatories by explaining that it is her view (which was suggested to her by counsel) that information supplied to the Commission, if too complete, could just cause trouble for San Antonio Video.

175. The testimony of Oliver Heard and Mary Decker indicates that there are no contemporaneous documents to back up their representations to the Commission about San Antonio Video's finances. San Antonio Video's principals' rationalizations about the applicants' finances are inconsistent and there is no documentary or third party support for their claims. The testimony, moreover, demonstrates that San Antonio Video deliberately tried to make the Commission believe that it had complied with the requirements of Form 301 and that efforts to meet those requirements were carried out by Mary Decker. [26]

176. San Antonio Video certified to the Commission that it had net liquid assets available to construct and operate when it had not made that determination. It cannot even be said that San Antonio Video knew then or now what funds it would need since it had not prepared any estimates of construction and operation. These representations were made by its president, Mary Decker, with her full understanding of what steps were required to document and justify the certification. When questioned during discovery about her actions in certifying to San Antonio Video's financial qualifications, she represented that she had documented her determination, and, moreover, that she had prepared the necessary estimates of the cost of construction and operation. When questioned at hearing sessions, she conceded she had not performed the necessary steps but she believed her son, Oliver Heard, would provide the money. The evidence of record does not establish that any other principal had developed a documented plan to finance the applicant. Claims made by Oliver Heard that arrangements had been made with the Frost Bank to lend him the money proved to be untruthful. Overall, San Antonio Video's showing on this issue demonstrates that its representations to the Commission about material and fundamental facts regarding its qualifications cannot be relied on. San Antonio Video is not qualified to become a licensee.

IV. Comparative Considerations

177. Two applicants in the proceeding, Nueva Vista and Vela, are fully qualified. Neither one has an interest in the mass media; they are, therefore, equal on diversification of the media of mass communications. Vela Broadcasting is a general partnership and both partners, Fred Vela and Velia Vela, propose to work full time (40 hours per week) in management. Fred Vela would be the station's general manager and have over all managerial responsiblity for the day-to-day operation of the station. Velia Vela, Fred's wife, would be the station's director of public affairs. She also claims that she would be responsible for the production of public affairs and non-news programming, that she would initiate policy, and that she would supervise employees who produce programming. But the last listed duties were afterthoughts and cannot be credited. The claim that she would perform them was announced for the first time in her written testimony exchanged on November 25, 1985, even though she had been asked to declare her intentions in a statement that was-filed on August 8, 1985 and in interrogatories.

178. Furthermore, the record only supports a conclusion that she will explain the station's product to the public. It does not permit the conclusion that she will participate in determining the policy and operation of the station. While her integration promise can be credited, it "cannot be given the decisional significance attributed to the integration of [owners] exercising policy functions." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395 (1965).

179. Nueva Vista has four general partners who are now voting stockholders, each of them proposes to work at the station full time (40 hours per week). David Davila owns a 51% voting interest. [27] He would be the general manager and direct all facets of the day-to-day operations. Nicasio Flores owns a 15% voting interest. He would be

responsible for the station's financial plans and policy. He would approve expenditures, prepare financial statements and supervise billing and collections.

180. Edward Gonzalez owns a 15% voting interest. He proposes to work as news director at the station. He would supervise news personnel, oversee production of news programs, and anchor the news program. Maria N. Flores, Nicasio's wife, owns a 19% interest. She would work as the station's public affairs director. She would be the station's liaison with the community, produce public affairs programs, and insure compliance with the Fairness Doctrine.

181. The quantitative integration proposals of Nueva Vista and Vela are not the same. While the voting owners of both applicants would work at the station full time, only 50% of Vela's partnership will occupy a position having policy functions. Ms. Vela's position directing public affairs will not entail work that insures she will play an important role in management. That is not the case with Nueva Vista's integrated stockholders; it is apparent that they will.

182. The qualitative proposals are similar but not the same. Fred and Velia Vela live in Leon Valley which is contiguous to San Antonio. They have lived there since 1981 but before that they lived in the city of San Antonio. Mr. Vela lived in San Antonio from 1973 to 1981 and Ms. Vela lived in San Antonio all of her life until she moved to Leon Valley. Both of the Velas have participated in San Antonio civic affairs. But the Velas have misrepresented the roles they played in several of the activities they claim credit for. While it appears that they did participate in civic affairs (although many of their activities were a required part of their work in operating McDonald's restaurants), it is evident their representations are not reliable. The record reflects they frequently claimed a greater degree of participation than was, by their own admission, the case. In their written testimony the Velas represented that they played a leadership role in their activities and they assigned titles to their participation that were not given to them by the organization but instead were made up for purposes of their testimony. The titles assigned, moreover, did not accurately reflect their actual participation. These inflated and false claims of civic participation do not lead to the conclusion that their testimony "indicates a likelihood of continuing knowledge of changing local interests and needs." The quality of their integration proposal must, therefore, be diminished. They have no broadcast experience but they are Hispanic and Ms. Vela receives credit for being female.

183. Nueva Vista's David Davila lived in San Antonio from 1977 to 1982 and again from 1984 to 1986. In June of 1986, after the comparative hearing, he moved to Edinburgh, Texas, outside the service area. He would return to San Antonio if a grant is received. Mr. Davila has participated in San Antonio civic activities since 1977. He is Hispanic. Nicasio Flores has lived in San Antonio since 1980 and he has participated in civic activities. He is Hispanic. Edward L. Gonzalez has lived in San Antonio since 1978; he is Hispanic; and he has been a television reporter and producer since 1971. Maria Flores has lived in San Antonio since 1980; she is Hispanic and a woman; and she has participated in civic activities as part of her employment.

184. The Velas have a longer association with San Antonio and have participated in its civic affairs for a longer period of time than the voting owners of Nueva Vista. The Flores have been in San Antonio for six years and the other Nueva Vista principals have been there even longer. Only Mr. Gonzalez has not participated in civic activities. Overall the qualitative difference between Vela and Nueva Vista is not substantial. Both applicants propose 100% integration and both applicants' integrated principals are Hispanic. Nueva Vista would integrate Ms. Vela who represents one-half of the voting ownership while Nueva Vista would integrate Ms. Flores who holds only a minority voting interest of 19%. Vela is, therefore, to be preferred for its female integration. Only Nueva Vista would integrate an owner with broadcast experience. Mr. Gonzalez, a holder of a 15% voting interest, has worked in television broadcasting for 15 years.

185. Nueva Vista would provide a first service to 21,388 and second service to 38,149. Vela would not extend service to any undeserved population. While there is no decisionally significant difference between Nueva Vista and Vela in the overall population and areas they would cover, Nueva Vista is substantially preferred in this area because of the significant number of people it will serve with a first and second service. *Christian Broadcasting of the Midlands*, 99 F.C.C. 2d 578, 582-83 (Review Board 1984). Nueva Vista and Vela's integration promises present a clear quantitative choice. Fred Vela will manage and make policy but he represents only half of the ownership. Velia Vela will participate but her role is not of the same decisional significance because she will not have a policy role. All of Nueva Vista's voting stockholders would manage and have policy roles. The qualities which enhance Vela's proposal are unreliable and, therefore, it must be concluded that Nueva Vista also presents a better qualitative proposal. Over all, Nueva Vista will give the best practicable service.

ACCORDINGLY, IT IS ORDERED that the motion for extension of time, filed June 18, 1986 by Nueva Vista Productions, Inc. IS GRANTED.

IT IS FURTHER ORDERED that the requests for permission to file appeal, filed April 4, 1986 by San Antonio Broadcasting, Inc. and TV 60 Limited Partnership ARE DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the motion for leave to file petition for reconsideration, filed April 15, 1986 and motion for leave to file supplement to petition for reconsideration, filed May 13, 1986 by San Antonio Broadcasting, Inc. ARE DENIED.

IT IS FURTHER ORDERED that the petition for reconsideration, filed April 21, 1986 by TV 60 Limited Partnership IS DENIED.

IT IS FURTHER ORDERED that the motion to enlarge issues against Pro 60 Communications, Inc. and Amistad Communications of the Southwest, filed May 27, 1986 by Nueva Vista Productions, Inc. IS DISMISSED AS MOOT, except to the extent it was considered.

IT IS FURTHER ORDERED that the petitions for leave to amend, filed January 16, April 25, May 28, 1986 by San Antonio Broadcasting, Inc. ARE GRANTED and the amendments ARE ACCEPTED.

IT IS FURTHER ORDERED that the motions for leave to amend and amendment, filed April 4 and September 23, 1986 by San Antonio Broadcasting, Inc. ARE DENIED.

IT IS FURTHER ORDERED that the petitions for leave to amend, filed May 9, June 20, and September 24, 1986 by San Antonio Video Corp. ARE GRANTED and the amendments ARE ACCEPTED.

IT IS FURTHER ORDERED that the petitions for leave to amend, filed June 30 and July 9, 1986 by Nueva Vista Productions, Inc. ARE GRANTED and the amendments ARE ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to amend, filed October 24, 1986 by Lesvia Guerra-Cox and Cynthia (Fitrah) Muhammad d/b/a Amistad Communications of the Southwest IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the motion for leave to file supplement to proposed findings of fact and conclusions, filed May 30, 1986 by San Antonio Broadcasting, Inc. IS DENIED.

IT IS FURTHER ORDERED that the motion to reopen and to enlarge issues against Nueva Vista Productions, Inc., filed May 16, 1986 by San Antonio Video Corporation IS DENIED.

IT IS FURTHER ORDERED that the comment on San Antonio Video Corporation's petition to reopen and to enlarge issues, filed May 28, 1986 by San Antonio Broadcasting IS STRICKEN from the record.

IT IS FURTHER ORDERED that the motion to dismiss the applications of TV 60 Limited Partnership (File No. BPCT-841129KH), Lesvia Guerra-Cox and Cynthia (Fitrah) Muhammad d/b/a Amistad Communications of the Southwest (File No. BPCT-841129KJ), Pro 60 Communications, Inc. (File No. BPCT-841129KZ) and San Antonio Broadcasting, Inc. (File No. BPCT-841129LA), filed April 3, 1986 by Nueva Vista Productions, Inc. IS GRANTED and the applications ARE DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the applications of Vela Broadcasting Co. (File No. BPCT-841127KH) and San Antonio Video Corp. (File No. BPCT- 841129KG) ARE DENIED and the application of Nueva Vista Productions, Inc. (File No. BPCT-841129LD) for a construction permit for a new commercial television facility to operate on Channel 60 at San Antonio, Texas IS GRANTED. [28]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge
Federal Communications Commission

FOOTNOTES

[1] The following six applications were dismissed: Fiesta Communications, Ltd. (File No. BPCT-841129KM) and Salinas-Oatman Corporation (File No. BPCT-841129LF), *Memorandum Opinion and Order*, FCC 85M-2969, released July 29, 1985; Thomas TV Associates (File No. BPCT-841129KX) and Spanish American Broadcasting, Inc. (File No. BPCT-841129KY), *Memorandum Opinion and Order*, FCC 85M-4027, released October 15, 1985; Hispanic Broadcasters of San Antonio, Inc. (File No. BPCT-841129LL), *Memorandum Opinion and Order*, FCC 85M-4717, released December 2, 1985; and Televista Broadcasters of San Antonio (File No. BPCT-841129L0) Tr. 1842, December 17, 1985.

[2] This is contrary to Heard's testimony at the December hearing, where he said he did not make the decision that SAVC was financially qualified. Tr. 478.

[3] On March 27, 1986, SAVC petitioned for leave to amend to report that Frontier Southwest received a permit for Channel 55 at Austin. In the amendment SAVC stated that Mr. Heard is also a director of Frontier Southwest; that information is not in SAVC's exhibits and this amendment does not explain when he became a director. When such matters are unexplained, it raises questions about whether SAVC has met its burden to explain completely its media holdings. On September 24, 1986, SAVC reported that Frontier Southwest was issued a CP for an LPTV station to operate on Channel 61 at Baton Rouge, Louisiana. In addition, SAVC reported on September 24 that Frontier Gulf and Frontier Fort Worth Broadcasting, Inc. have been selected in lotteries to operate Channels 57 and 63 at Atlanta, Georgia; Channel 69 at New Orleans, Louisiana; Channel 63 at Fort Lauderdale, Florida; and Channel 61 at Fort Worth, Texas. When these interests were acquired is not reported.

[4] Ms. Vela claims that for two years she has been the Business Manager and Training Director of Vela Foods where she supervises 50 people. Vela Exh. 5 at 4; Tr. 158. But in interrogatory answers she said that she was a "secretary and bookkeeper." Tr. 159. And at the hearing she conceded that she supervises three clerical employees. Tr. 162.

[5] TV 60 and Amistad, in their proposed findings, point out that Ms. Vela's activities listed in her testimony differed from those represented in statements filed with the Commission and answers to interrogatories. Vela responds that the difference arises because the applicant believed only activities before 1985 were sought in the interrogatories. TV 60 and Amistad urge findings which demonstrate that both of the Velas have misrepresented the kind of participation they undertook. In her written testimony Ms. Vela states she was Volunteer Coordinator of Telethon Navidano but in answer to interrogatories she described her role as "helping to decorate the studio, serving refreshments and answering the phone during the telethon." Tr. 164. Mr. Vela claimed the same title in his written testimony. Vela Exh. 2 at 1. But in answer to interrogatories he claimed only that he "help[ed] transport food to and from the telethon and answered phones during the telethon." He concedes he never had the title he claimed. Tr. 67. Both Velas also claimed they were co-founders of the Ronald McDonald House in San Antonio. Vela Exh. 2 at 2, Exh. 5 at 3. In fact, all owners and operators of McDonald franchises were co-founders. Mr. Vela also claimed to have been a Fundraising Coordinator for Ronald McDonald House but in interrogatories he said that he was a volunteer at the grand opening ceremonies. Mr. Vela conceded he never had the title he claimed. Tr. 75.

[6] Vela and TV 60 request a finding that Ms. Torralva would be responsible for only the day-to-day decisions about programming. They urge that Ms. Oliva's testimony contradicts Ms. Torralva's claim that she would exercise the overall authority assigned to a station's general manager. They also argue that Ms. Oliva did not know what her duties would be and that she envisions her role as that of office manager. Vela and TV 60's views do not represent a fair reading of Ms. Oliva's testimony. She testified that she would defer to Ms. Torralva's opinion about programming because of her greater experience in that area. Tr. 1822, 1824. But the cross- examination testimony and direct testimony in general indicates that Ms. Torralva will have supervisory responsibilities over a variety of station jobs and that Ms. Oliva and Ms. Torralva will each have separate responsibilities over the general operation of the station. Tr. 1793, 1794, 1819-28. Their interests in the applicant are equal, however, and in that respect they have a similar right to insure that the station is well run. There is no record support for the claim that Ms. Oliva views her position as that of an office manager.

[7] On April 25, 1986, San Antonio Broadcasting petitioned for leave to amend to report that Ms. Perez had purchased 643,270 shares of non-voting Class B stock from Sunbelt Tectonics. Sunbelt had subscribed to 1.5 million of the authorized 2.25 million Class B shares; in the amendment San Antonio Broadcasting reports that Sunbelt has been released from that obligation. The request for leave to amend will be granted.

[8] On April 25, 1986, SABI reported that Sunbelt had sold its acquired interest to Ms. Perez and that Mr. Tejadilla was no longer employed by Sunbelt.

[9] On june 30, 1986, Nueva Vista petitioned for leave to amend to report that Mr. Davila had taken a new job in McAllen, Texas. On July 9, 1986, Nueva Vista petitioned for leave to amend to report that Mr. Davila has taken up residence at Edinburg, Texas. He represents that he continues to own his San Antonio home and would return there if a grant is made. The petitions for leave will be granted and the amendments accepted.

[10] TV 60, Almistad, Pro 60, and SABI all proposed broadcasting from the same site. After submission of the Joint Exhibit another entity leased their proposed site. TV 60 and SABI filed motions to amend to a new site, which were denied, and Pro 60 and Amistad initially stated that they would amend also but after a number of months, they claimed the site was again available. The impact of their actions is weighed in this decision. Nevertheless, findings are made about the originally proposed site of those four applicants.

[11] Request for Permission to File Appeal, filed April 4, 1986 by San Antonio Broadcasting, Inc.; Request for Leave to File Appeal, filed April 4, 1986 by TV 60 Limited Partnership.

[12] Motion for Leave to File Petition for Reconsideration and Petition for Reconsideration, filed April 15, 1986, supplemented May 13, 1986, by San Antonio Broadcasting, Inc.; Petition for Reconsideration, filed April 21, 1986 by TV 60.

[13] Joint Statement for the Record by Pro 60 Communications, Inc. and Amistad Communications of the Southwest, filed April 16, 1986; Statement for the Record by Pro 60 Communications, Inc., filed April 29, 1986; Statement for the Record, filed May 7, 1986 by Pro 60 Communications, Inc.

[14] Motion to Enlarge Issues, [against San Antonio Broadcasting and Pro 60 Communications], filed May 27, 1986 by Nueva Vista Productions, Inc.

[15] Motion to Dismiss [the applications of TV 60 Limited Partnership, Amistad Communications of the Southwest, Pro 60 Communications, Inc., and San Antonio Broadcasting, Inc.], filed April 3, 1986 by Nueva Vista Productions, Inc.

[16] On January 16, 1986, San Antonio Broadcasting moved to amend its application to inform the Commission that it no longer could use the KBUC site. That amendment is accepted in this order.

[17] Joint Statement for the Record by Pro 60 Communications, Inc. and Amistad Communications of the Southwest, filed April 16, 1986.

[18] Statement for the Record by Pro 60 Communications, Inc., filed April 29, 1986.

[19] Statement for the Record, filed May 7, 1986 by Pro 60 Communications, Inc.

[20] Petition to Enlarge [against Pro 60 Communications and Amistad Communications], filed May 27, 1986 by Nueva Vista Productions, Inc.

[21] Opposition by Pro 60 Communications, Inc. to Motion of Nueva Vista Productions Inc. to Enlarge Issues, filed June 11, 1986.

[22] Opposition to Motion to Enlarge Issues, filed June 18, 1986 by Amistad Communications of the Southwest.

[23] Pro 60 is also aware of the risk. It has argued at length in its findings that a prevailing applicant often amends to the site designated by an unsuccessful applicant. See "Proposed Findings of Fact and Conclusions of Law of Pro 60 Communications, Inc.", filed February 20, 1986 at 84-89.

[24] The applicants designating the KBUC site claim that their assurance for use of that site is no different than the site designations considered by the Board in *Mary S. Bohi, supra*, 103 F.C.C. 2d 1008 and *Arizona Number One Radio, Inc., supra*, 103 F.C.C. 2d 550. In fact they are quite different. In *Mary S. Bohi*, the applicants designated a site where an existing licensee planned to move and build a tower; moreover, that licensee filed an application with the Commission to carry out the change. While the actual entity that would build the tower changed, there never was any reason to assume that the tower was not going to be built or that the existing licensee would not need a tower at that location. Unexpectedly, the station that intended to move decided not to and its right to build a tower on the site was conveyed to a party that would not agree to construction of an antenna tower. In *Arizona Number One Radio* applicants which proposed using federal land could not receive assurance that they actually could use the government's land until after they had received a grant from the FCC. While there was a possibility that permission would not be granted, the site had been designated by the Bureau of Land Management as an antenna site location. In that very unusual context, the Board believed that the applicants had achieved the only kind of assurance possible if federal land was to be used. In San Antonio, the KBUC site could have been secured by an inexpensive option and other sites were readily available.

[25] On May 28, 1986, San Antonio Broadcasting filed a "Comment on Petition to Reopen and to Enlarge Issues." §1.229 does not provide for comments and this filing will be stricken from the record.

[26] Even when a letter was prepared by Frost Bank for use before the Commission, an effort was made to create the impression that Mary Decker was involved in arranging for the letter. Actually she had nothing to do with it; the transaction was arranged by her son, Oliver Heard who, San Antonio Video claims, is not directing the affairs of the applicant.

[27] Several of the applicants claim the ownership interests held by the Nueva Vista stockholders are inconsistent with the original interest they held in the partnership at the B cutoff date. They argue that the Nueva Vista Partnership Agreement does not alter the Texas Uniform Partnership Act which provides that general partners have equal rights. Nueva Vista responds by pointing out that the Texas Uniform Partnership Act permits general partners to vary their rights. It claims that Nueva Vista's partners did that by oral agreement. Nueva Vista's claim of an oral agreement giving disproportionate voting rights is substantiated by the ownership shares it reported to the Commission, on both the A and B cutoff dates, the written partnership agreement's provisions for different contribution, profit and loss obligations and rights which coincide with the claimed voting interests, and the method in which the partnership operated. The share of voting stock held by each stockholder is in direct proportion to the authority and interest each partner had. It is also argued that Mr. Davila's authority is so complete because of his 51% interest and his actions in exercising his interest, that none of the other voting stockholders can or do effectively exercise their rights. It is evident from the record that, when disputed actions have been proposed, Mr. Davila's view has prevailed but it is also apparent that he did not act without consulting the other voting owners or without their participation. Tr. 1167-68; 1028, 1090, 1169, 1297, 1299. Additionally, it is claimed that Nueva Vista's stockholders will not exercise policy functions because of Mr. Davila's ownership

role. The record reflects that Mr. Davila will have the authority to review and overrule policy determinations but the evidence leaves no doubt that the other Nueva Vista stockholders will initiate policy for the station.

[28] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Petition of the Ameritech Operating Companies for a Waiver of Section 64.702(c)(2) of the Commission's Rules to Permit Ameritech Services, Inc. to Provide Warehousing and Related Services to Their Respective *Computer II* Subsidiaries — ENF 85-16

MEMORANDUM OPINION AND ORDER

Adopted: October 29, 1986 Released: November 14, 1986

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. A Petition for Waiver of Section 64.702(c)(2) of the Commission's Rules[1] was filed by the Ameritech Operating Companies[2] on February 25, 1985, seeking authority for Ameritech Services, Inc. (Services),[3] to provide warehousing and related services to Ameritech Communications (Communications), the CPE subsidiary of American Information Technologies Corporation (Ameritech) and, through its contractual relationship with Communications, to the *Computer II* subsidiaries of the operating companies. For the reasons set forth herein, the waiver is granted.

II. BACKGROUND

2. In the *BOC Separation Order*,[4] Ameritech and its *Computer II* subsidiaries were allowed to share, on an interim basis, the same administrative services as had earlier been authorized for American Telephone and Telegraph Company (AT&T). Also, Ameritech was ordered to file a shared services plan, and a capitalization plan for the formation of a separate Computer II entity. *Id.* at 1146-1147.[5] During the staff's review of Ameritech's capitalization plan, Ameritech stated that its CPE subsidiaries had contracted with Communications to provide warehousing for residence and small business products in Michigan, Indiana and Illinois. While Communications arranged for the warehousing, it was actually provided by Services. However, Services also provided warehouse services to the operating companies. The staff report on Ameritech's capitalization plan concluded that warehousing of CPE was not one of the services which AT&T had been allowed to share and that absent a waiver, the provision of warehousing services to CPE subsidiaries through the operating companies or through any organization or entity owned by them violated the Commission's rules.[6]

3. In response to the staff report, the Ameritech Operating Companies submitted the subject petition for waiver of Section 64.702(c)(2) of the Commission's Rules to permit Services to provide warehousing and related services (as defined in the Plan included in the waiver request) to the *Computer II* subsidiaries. An Opposition to the petition was filed by the North American Telecommunications Association (NATA). Comments were filed by Pacific Bell and Nevada Bell and the Independent Data Communications Manufacturers Association, Inc. (IDCMA). Reply Comments were filed by Ameritech. In response to the issues raised by the parties herein, the Ameritech Operating Companies submitted on January 31, 1986, a revised plan updating the warehouse activities provided by Services to Communications. On February 5, 1986, copies of the revised plan were sent to the parties for comments. No comments were received.

III. DESCRIPTION OF REVISED PLAN

4. The revised warehousing plan sharply curtails the sharing arrangements included in the original plan by eliminating Ohio Bell and Illinois Bell as parties, and curtailing the activities relating to Wisconsin Bell and Michigan Bell. Services will provide transportation services to Wisconsin Bell's CPE subsidiary, Wisconsin Bell Communications, Inc. Transportation services consist of receiving CPE at Services' facility, and transporting it to the Wisconsin Bell facilities. Also, overnight warehousing of the CPE may be necessary, depending upon receipt and delivery schedules. Services will also transport CPE between Wisconsin Bell Communications, Inc. facilities. Three of Services' employees will perform the above activities, and the operating companies estimate that 50 hours per month will be devoted to this service.

5. The only other warehousing activities involve Michigan Bell and its CPE subsidiary, Michigan Bell Communications, Inc. Services will provide approximately 2000 square feet of warehouse space for Michigan Bell Communications, Inc., at Services' Plymouth, Michigan location. Services' personnel will provide oversight of Michigan Bell Communications, Inc., materials stored in the warehouse, such as inspecting incoming materials for damage, placing cartons on shelves, and re-stocking returns. One employee will spend approximately 20 hours per week performing the above duties, including removing stock from shelves for outbound shipment by unaffiliated carriers.

6. According to the Ameritech Operating Companies, Services will use a detailed cost methodology to determine its charges to the various Communications companies. Services employees performing work for Communications will code their hours to specific function codes. The hours will be captured on Services' General Ledger Reports and billed to Communications using hourly labor rates that include both the employee base rate, associated benefits and a contribution to fixed departmental and corporate costs. The charges for the rental of warehouse space will be based upon total occupancy charges spread over the total square footage of warehouse space in all Services facilities. This space, according to Ameritech, is easily measured because it is physically separate from other warehouse space. Finally, Communications will continue to purchase items from Services which are routinely stocked for the Ameritech Operating Companies. However, according to the Ameritech Operating Companies such transactions are sales, not a provision of a shared administrative service.

IV. DISCUSSION

7. In the *Second Computer Inquiry*, *supra*, the Commission rejected the concept of a stringent, total separation of the regulated and CPE operations of AT&T. It held that the carriers should be able to take advantage of efficiencies to be gained from sharing some services, so long as contervailing regulatory considerations do not demand stringent separation and there is an accounting system in place to identify the cost of the sharing. (77 FCC 2d at 476).

8. Based on our review, we find the Ameritech Operating Companies' revised warehousing plan to be consistent with the policies set forth in the *Second Computer Inquiry*, *supra*. First, as noted above, the level of sharing between Services and Communications is minimal. Second, even at that level, Services has developed a costing methodology which attempts to eliminate the potential for cross-subsidy between the regulated and non-regulated entities.[7]

V. CONCLUSION

9. Based on the foregoing, we conclude that the revised plan for the provision of warehousing service is acceptable. Thus, we grant the Ameritech Operating Companies' waiver request to share those warehousing services specified in that revised plan.

VI. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended (47 U.S.C. Sections 154(i) and 154(j)), that the petition for waiver submitted by the Ameritech Operating Companies, as modified by the January 31, 1986 revised plan, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Section 64.702(c)(2) of the Commission's Rules requires that some carriers provide Customer Premises Equipment (CPE) only through an entity that is structurally separated from the carrier's regulated communications operations. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980), *recon.* 84 FCC 2d 50 (1980), *further recon.* 88 FCC 2d 512 (1981), *aff' d sub nom.* Computer and Communications Industry Ass'n v F.C.C., 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[2] The Ameritech Operating Companies are: Illinois Bell Telephone Company (Illinois Bell), Indiana Bell Telephone Company, Inc. (Indiana Bell), Michigan Bell Telephone Company (Michigan Bell), The Ohio Bell Telephone Company (Ohio Bell), and Wisconsin Bell Inc. (Wisconsin Bell).

[3] Services is jointly owned and directed by the five operating companies.

[4] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services, and Cellular Communications Services By the Bell Operating Companies (*BOC Separation Order*), 95 FCC 2d 1117 (1984), *recon* FCC 84-252 (released June 1, 1984), *aff' d sub nom.* Illinois Bell Telephone Co. v. F.C.C., 740 F. 2d 465 (7th Cir. 1984), *decision on recon.* aff'd sub nom. North American Telecommunications Ass'n v. F.C.C., 772 F. 2d 1282 (7th Cir. 1985).

[5] Ameritech's shared administrative services plan was approved in part and rejected in part. American Information Technologies Corp., Plans for Sharing Administrative Services, Mimeo No. 4045 (released May 1, 1986).

[6] American Information Technologies Corp., 102 FCC 2d 1089 (1985), Appendix B at para. 43.

[7] Revisions in the costing methodology may, of course, be required when the Commission adopts additional guidelines for the apportionment of costs between regulated and unregulated activities. See Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities (CC Docket 86-111), FCC 86-146 (released April 17, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-1

WATS-Related and Other Amendments
of Part 69 of the Commission's
Rules

ORDER

Adopted: November 6, 1986 Released: November 14, 1986

By the Chief, Common Carrier Bureau

1. On November 3, 1986, the Telecommunications Committee of the American Petroleum Institute (API) and the Utilities Telecommunications Council (UTC) filed a joint motion requesting that we extend the time for filing comments in response to an MCI Petition for Clarification to November 24, 1986, and the time for filing reply comments to December 8, 1986. The petition was filed September 26, 1986. We provided that comments would be due on November 10, 1986, and reply comments on November 24, 1986. Public Notice, Mimeo No. 0109 (released October 8, 1986). API and UTC said that they had a strong interest in filing comments in response to MCI's petition, but had been unable to devote the required time and resources to it because they had been occupied with the recently filed interstate access charges.

2. It is the policy of the Commission, set forth in Section 1.46(a) of the Commission's rules, 47 C.F.R. § 1.46(a) (1984), that extensions shall not be routinely granted. Although we appreciate the demands on the time and resources of API and UTC, we believe that the initially established pleading cycle, which allows more than 40 days from the filing of the MCI petition and more than 30 days from the date the petition was put on Public Notice, provides sufficient time to prepare comments. We believe that this is not an instance in which it is appropriate to grant an extension, and we therefore deny the joint motion of API and UTC.

3. Accordingly, IT IS ORDERED, that the Joint Motion for Extension of Time by the Telecommunications Committee of the American Petroleum Institute and the Utilities Telecommunications Council, IS DENIED. This action is taken pursuant to Sections 4(i) and (j) and 201 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), (j) and 201 (1982), and Sections 0.91(h) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(h), 0.291 (1984).

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Compliance of Earth Stations
Initially Authorized Before February 15,
1985 with Section 25.209 of the
Commission's Rules

Order

Adopted: November 6, 1986 Released November 14, 1986

By the Chief, Common Carrier Bureau:

1. In *Reduced Orbital Spacing*,[1] the Commission adopted a policy in which orbital spacings between domestic fixed-satellites would be reduced to 2°.[2] In order to achieve this reduction in spacing, more stringent earth station antenna performance standards, as set out in Section 25.209 of the Commission's rules,[3] were adopted. Earth station antennas initially authorized before February 15, 1985, however, did not have to be brought into conformance with the improved performance standards until January 1, 1987.[4] By that date, licensees of these antennas were required to demonstrate that the antenna complies with the strict sidelobe standards set forth in 25.209(a) and (b) or, in the alternative, that its operation fully complies with 2° spacing. Even if neither of these criteria could be met, the Commission stated that the earth station facility could nevertheless be authorized to continue to operate if the licensee could demonstrate that use of the nonconforming antenna would not cause unacceptable interference.[5]

2. To delay any modifications or replacements that were not necessary given the gradual transition to 2° orbital spacings, the Commission provided approximately two years for operators to bring antennas authorized before February 15, 1985 into compliance with the revised performance standards. This was intended to allow existing investment in the nonconforming ground segment to be amortized, while still allowing for ultimate 2° spacings when necessary to accommodate additional satellites. Further, the Commission established a Government/Industry Advisory Committee to help implement 2° spacing. The Advisory Committee was, among other things, to develop recommendations that would minimize any potential adverse impact on existing operators during the move to 2° spacing. It also was to develop tests and verification measurements and propose operational criteria to which existing licensees could simply certify to demonstrate compliance with Sections 25.209(a) and (b). Finally, the Advisory Committee was asked to develop standards by which an operator not in compliance with these rules could continue to operate under Section 25.209(f) by demonstrating that its nonconforming antenna would not cause unacceptable interference.[6] On July 1, 1986, the Advisory Committee submitted its final report and we expect that the Commission will shortly issue a Notice of Proposed Rulemaking to consider the recommendations made. This Notice will request comments on, among other things, the adoption of guidelines that would allow antennas not conforming to the requirements of 25.209(a) and (b) to operate indefinitely under the proviso of Section 25.209(f).

3. It is premature to require licensees to conform to Section 25.209 by January 1, 1987. First, the need for full discussion and coordination among the Committee's representatives resulted in the filing of the final report in July of this year. The technical recommendations made in this report will form a basis to establish guidelines for authorizing non-complying antennas. There is insufficient time, however, in which to solicit comments and implement guidelines before January 1, 1987. Second, an unforeseen disruption in the supply of launch services has resulted in launch delays and a consequent delay in implementation of 2° spacing, thus mitigating somewhat the need to adhere to the January 1 date. Therefore, an interim procedure by which noninterfering earth stations may be authorized to continue operating is hereby adopted. Under this procedure, licensees desiring to continue operating antennas not in compliance with Section 25.209(a) and (b) must notify the Commission.[7] This notification will be sufficient to demonstrate compliance with Section 25.209(f) pending the completion of the rulemaking. Absent a specific objection from any party receiving harmful interference, every notified antenna will be presumed authorized.

4. To implement this procedure, authorizations of nonconforming earth stations will be recorded in a central notification file. In the event unacceptable interference is being caused, this notification file will assist both the Commission and other operators to locate the antennas causing interference. In order for non-conforming antennas to be automatically authorized pursuant to Section 25.209(f), we will require each earth station operator to notify the Commission of the following:

(a) Call sign, file number and date of station authorization;
(b) street address, city, county, and state of earth station; and
(c) street address, city, county and state of any remote control point.

These notifications must be filed on or before December 31, 1986, and should be captioned as "Compliance with Section 25.209."

5. The requirements contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

6. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, any earth station antenna notified to the Commission WILL BE AUTHORIZED to continue to operate without conforming to Section 25.209(a) and (b) until either 6 months from completion of the rulemaking proceeding[8] or until the Commission notifies the operator that harmful interference is being caused by its non-conforming antenna, whichever occurs first.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 48 Fed. Reg. 40233 (September 6, 1983).

[2] Uniform 2° spacing at 12/14 GHz was implemented immediately, while an average of 2.5° was applied as a transition mechanism at 4/6 GHz. Reduced spacing was delayed at 4/6 GHz to minimize the costs involved in upgrading or replacing existing antennas. However, operators were placed on notice that uniform 2° spacings were to be initiated when necessary to accommodate increased demand for satellite services. Domestic Fixed-Satellite Service, 94 FCC 2d 129 (1983). In 1985, 2° spacing was implemented in the 4/6 GHz band to accommodate additional satellites. Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 35228 (August 30, 1985). Because these satellites were to be launched over a five year period, the maximum potential for interference would not arise until the 1990s.

[3] 47 C.F.R. § 25.209. Specifically, earth station antennas are required to be designed to meet specific numerical standards for co-polarized and cross-polarized discrimination levels. These standards are set forth in 47 C.F.R. §§ 25.209(a) and (b).

[4] Licensing of Space Stations in the Domestic Fixed-Satellite Service, *supra* note 1, *recon.*, 99 FCC 2d 737 (1985) (*Reconsideration Order*).

[5] 47 C.F.R. § 25.209(f).

[6] *Reconsideration Order*, *supra* note 4, at paras. 22-23.

[7] Several licensees have filed waiver requests pursuant to Section 25.209(f) so that operations of nonconforming antennas may continue beyond January 1, 1987. However, because the Commission in its anticipated rulemaking may adopt specific criteria by which antennas not in compliance with Sections 25.209(a) and (b) may be authorized under Section 25.209(f), we believe it premature as well as unduly burdensome to act on each of the pending requests on an *ad hoc* basis. Action will be deferred on these applications until completion of the rulemaking. Applicants may, of course, amend any pending request in view of any action ultimately taken. In the interim, these applicants may continue to operate their earth station facilities upon their submission of the minimal information required in para. 4, *infra*.

[8] By that time, we expect the Commission to have completed the rulemaking proceeding and to have adopted concrete operational criteria to authorize most non-conforming antennas on a permanent basis.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT TELECOMMUNICATIONS COPR. | File No. CSG-86-072-P/L

Application for authority to construct and operate an international earth station at Belleville, Illinois for provision of INTELSAT Business Services

ORDER AND AUTHORIZATION

Adopted: November 6, 1986 Released: November 14, 1986

By the Common Carrier Bureau:

1. The Commission is considering an application, filed on September 8, 1986 by TRT Telecommunications Corp. (TRT), requesting authority, pursuant to Title III of the Communications Act of 1934 and Section 201(c)(4), (c)(b) and (c)(7) of the Communications Satellite Act of 1962, to construct and operate international earth station facilities at Belleville, Illinois for provision of INTELSAT Business Services (IBS). The application was placed on public notice on September 17, 1986. No comments were received. The applicant has been granted blanket authority to establish and operate channels of communication between the U.S. and various overseas points for provision of IBS.[1]

2. The proposed earth station will consist of a 7.2 meter antenna connecting with AOR INTELSAT V satellites in the 6/4 GHz band. The proposed earth station will be constructed on the grounds of Scott Air Force Base near Belleville, Illinois. Initially, the earth station will be utilized to provide direct satellite access service to the U.S. Department of Defense.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. TRT's legal, technical, and financial qualifications to construct and operate the proposed earth station are established. TRT has been authorized to construct and operate other IBS earth stations.[5] The proposed earth station complies with INTELSAT performance criteria for IBS stations. TRT has completed the necessary frequency coordination.

5. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed stations. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of requested services and facilities is in the public interest.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309, and 319 of the Communications Act of 1934 and Section 201(c) of the Communications Satellite Act of 1962, that application File No. CSG-86-072-P/L IS GRANTED and TRT is authorized to construct and operate the proposed earth station at Belleville, Illinois to provide IBS and related digital video services.[6] Before completion of equipment installation and facility activation, however the applicant should provide the Commission with a summary of actually installed equipment.

8. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] See TRT Telecommunications Corp. (File No. I-T-C-85-073), Mimeo No. 3220 (released March 18, 1985).

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] See TRT Telecommunications Corp., File No. CSG-84-004-P/L, Mimeo No. 5195 (released July 6, 1984).

[6] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

GTE MOBILNET OF SANTA CRUZ LIMITED PARTNERSHIP — File No. 33881-CL-P-175-B-86

For authority to construct and operate a cellular system on frequency block B in the Domestic Cellular Radio Telecommunications Service to serve the Santa Cruz, California Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted November 10, 1986; Released November 14, 1986

By The Common Carrier Bureau:

1. On September 3, 1986, the Commission announced by *Public Notice* (Report No. CL-86-272) that GTE Mobilnet of Santa Cruz Limited Partnership (GTE) had been granted a construction permit for a cellular system on frequency block B in the Domestic Cellular Radio Telecommunications Service to serve the Santa Cruz, California Metropolitan Statistical Area (MSA). On November 6, 1986, Natubhai Patel (Patel), the non-wireline tentative selectee in the Santa Cruz MSA, filed a Petition for Deferral of Operating Authority.

2. In *Ameritech Mobile Communications, Inc.*, FCC 85-301, released July 14, 1985; *recon. denied*, FCC 86-281, released June 6, 1986, we stated that petitions for deferral of operation authority "may be filed within 14 days of public notice of a wireline covering license application . . . ." Since GTE has not yet filed its application for a covering license and since such an application has not, therefore, been placed on public notice, the petition filed by Patel is untimely filed.

3. In light of the above, IT IS ORDERED, That the Petition for Deferral of Operating Authority filed by Natubhai Patel IS RETURNED AS UNTIMELY FILED.

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE WESTERN UNION
TELEGRAPH COMPANY Transmittal No. 8601

Revisions to Tariff F.C.C. Nos. 240, 258, 283, 286, 287, 288 and 289

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1986 ;Released: November 14, 1986

I. INTRODUCTION

By the Chief, Common Carrier Bureau:

1. The above-captioned tariff revisions were filed by the Western Union Telegraph Company (Western Union) on August 8, 1986, and August 29, 1986, and are scheduled to become effective on November 17, 1986.[1] By these revisions, Western Union proposes to: (1) increase the domestic Telex Service dedicated access line usage rate by $0.08 per minute; (2) increase the domestic TWX Service dedicated access line usage rate by $0.04 per minute; and (3) increase the domestic component of the usage rates for Worldwide Telex Service by $0.08 per minute and reduce the international components by a like amount so that the overall per minute country-to-country rates would remain unchanged from those presently in effect.[2]

2. Petitions against the proposals were filed on August 15, 1986, by ITT World Communications, Inc. (ITT) and TRT Telecommunications Corporation (TRT).[3] ITT claims that Western Union's revisions cannot be justified by any underlying cost-of-service considerations. It argues, in part, that the proposal to reduce international rates and increase domestic rates by the same amount allows Western Union to utilize its dominant position in the domestic marketplace to cross-subsidize its operations in the international marketplace, thereby eliminating competition in the international arena. ITT Petition at 2, 8-9. ITT states that such an extension of dominance into the international market is not a result contemplated by the Record Carrier Competition Act of 1981 (codified at 47 U.S.C. § 222), which permitted Western Union to re-enter the international market. *Id.* at 7; *see also* TRT Petition at 2. Accordingly, ITT urges the Bureau to require Western Union to submit cost data justifying its proposed increase in domestic telex charges and to defer the effective date for these proposed tariff revisions until interested parties and the Commission have had an opportunity to review the cost support. ITT Petition at 3.

3. TRT asserts, *inter alia*, that Western Union proposes without justification to increase its domestic telex rates to small subscribers and competing common carriers by almost 22 percent. Moreover, TRT argues, Western Union proposes to establish rates applicable to other common carriers for the termination of telex calls which are significantly higher than rates available to large non-carrier users of Western Union's telex network for origination and termination of domestic calls. TRT contends that by establishing higher rates to competitors than are available to end users, Western Union will effectively preclude other carriers from competing for the business of large customers. TRT Petition at 1-2.

4. Western Union's reply, filed August 25, 1986, contains cost support which is intended to show that it is earning substantially below its authorized rate of return in the domestic telex market and substantially above the authorized rate of return for its combined outbound and inbound international telex traffic. It argues that this information demonstrates that it is neither over-pricing its domestic telex rates to cross-subsidize its international services nor under-pricing its international rates.

5. On September 23, 1986, the Common Carrier Bureau requested additional information from Western Union in order to evaluate the impact, if any, that the proposed revisions may have upon customers.[4] Western Union responded to the information request on October 3 and 14, 1986.[5] Both ITT and TRT commented on Western Union's response.[6]

II. DISCUSSION

6. The Common Carrier Bureau has reviewed the tariff, the petitions, the reply and the supplemental filings. We conclude that the proposed tariff revisions have not been shown to be so patently unlawful as to justify rejection. Nor have the petitioners adequately demonstrated that the cost support material submitted by Western Union does not justify the proposed rate revisions.

7. In addition, neither petitioner has carried its burden of proof to justify suspension of Western Union's tariff.[7] Western Union has been found to be a non-dominant carrier with respect to its provision of domestic Telex Service, domestic TWX Service, and Worldwide Telex Service.[8] Section 1.773(a)(1)(ii) of the Commission's Rules, 47 C.F.R. § 1.773(a)(1)(ii), sets forth the showing necessary to warrant suspension of a tariff proposal submitted by a non-dominant carrier.[9] That Section states: tariff filings by nondominant carriers will be considered *prima facie* lawful, and will not be suspended by the Commission unless the petition requesting suspension shows: (A) That there is a high probability the tariff would be found unlawful after investigation; (B) That the harm alleged to competition would be more substantial than the injury to the public arising from the unavailability of the service pursuant to the rates and conditions proposed in the tariff filing; (C) That irreparable injury will result if the tariff filing is not suspended; and (D) That the suspension would not otherwise be contrary to the public interest.

8. Applying this standard, we conclude that the petitioners have failed to present sufficient evidence that there is a high probability that the tariff would be found unlawful after investigation or that they will suffer irreparable harm if the tariff filing is not suspended. As mentioned above, the petitioners do not adequately demonstrate that the cost support material submitted by Western Union is not sufficient to support the proposed rate revisions. Nor have the petitioners convinced us that the harm alleged is irreparable. The petitioners provide examples of instances in which Western Union's proposed domestic rates, which must be paid by competing carriers handling traffic interconnected with the Western Union network, would equal that carrier's retained revenue after settlement with an overseas administration. Even if these allegations are true, the petitioners do not indicate wheth-

er the carriers' *total* payments to Western Union equal *total* retained revenues and whether they would be unable to offset possible losses through similar rate adjustments or through other competitive responses, such as seeking alternate means of handling their traffic. Absent such information, we are unable to conclude that the petitioners would suffer irreparable damage to their business activities so as to warrant suspension of Western Union's proposed tariff.

9. Accordingly, IT IS ORDERED that the petition for deferral of effective date and submission of cost support information, or, in the alternative, for suspension and investigation, filed on August 15, 1986, by ITT World Communications, Inc. against Western Union Telegraph Company Transmittal No. 8601, IS GRANTED IN PART and DENIED IN PART .

10. IT IS FURTHER ORDERED that the petition for rejection or suspension, filed on August 15, 1986, by TRT Communications Corporation against Western Union Telegraph Company Transmittal No. 8601, IS DENIED.

11. IT IS FURTHER ORDERED that the motion to accept supplemental comments in opposition to tariff filing, submitted by TRT Communications Corporation on September 8, 1986, IS GRANTED.

12. IT IS FURTHER ORDERED that the motion for acceptance of late-filed comments, submitted by ITT World Communications, Inc., on October 22, 1986, IS GRANTED.

13. IT IS FURTHER ORDERED that the petition for acceptance of supplemental comments, submitted by ITT World Communications, Inc., on October 31, 1986, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] The tariff revisions were initially scheduled to become effective on September 1, 1986. The Common Carrier Bureau directed Western Union to defer the effective date to November 6 in order to afford the Bureau an opportunity to analyze the issues raised by the petitioners. Letter from Chief, Tariff Division, to Western Union Telegraph Co. (Sept. 9, 1986). Western Union subsequently deferred the tariff voluntarily an additional 10 days. *See* Western Union Telegraph Co. Application No. 2146, filed Nov. 4, 1986; *see also* Letter from Chief, Tariff Division, to Western Union Telegraph Co. (Nov. 4, 1986).

[2] Western Union Telegraph Co., Transmittal No. 8601, at 1.

[3] ITT filed a pleading captioned as a "Petition for Deferral of Effective Date and Submission of Cost Support Information, or, in the Alternative, for Suspension and Investigation" (ITT Petition). TRT filed a petition for rejection or suspension (TRT Petition). On September 8, 1986, TRT filed a motion to accept supplemental comments in opposition to the tariff filing. We accept TRT's motion since it discusses cost data previously unavailable to TRT and since no party has objected and no party appears to be prejudiced by a grant of TRT's motion.

[4] Letter from Chief, Common Carrier Bureau, to Robert M. Fulton, Jr., Western Union Telegraph Company (Sept. 23, 1986); *see also* Public Notice, Commission Seeks Additional Information Regarding Western Union Telex Rate Revisions, Mimeo No. 7110 (Sept. 25, 1986).

[5] Letter from H. Richard Juhnke, Western Union Telegraph Co., to Chief, Common Carrier Bureau (Oct. 3, 1986); Letter from H. Richard Juhnke, Western Union Telegraph Co., to Chief, Common Carrier Bureau (Oct. 14, 1986).

[6] Letter from Roderick Mette, TRT Telecommunications Corporation, to Chief, Common Carrier Bureau (Oct. 21, 1986); ITT World Responsive Comments filed by ITT World Communications Inc., Oct. 22, 1986. ITT's comments were accompanied by a motion for acceptance of late-filed comments. We grant ITT's motion as no party opposed the motion and no party appears to be prejudiced.

[7] On October 31, 1986, ITT filed supplemental comments purporting to show, among other things, that it has carried its burden of proof for suspending rate revisions of non-dominant carriers under the Commission's Rules. ITT's comments were accompanied by a petition for acceptance of supplemental comments. Western Union opposed ITT's petition in a filing submitted on November 3, 1986. We grant ITT's petition as no party appears to be prejudiced.

[8] *See generally* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order, 95 FCC 2d 554, 564-66, 571-72 (1983), *aff' d on reconsideration*, Fifth Report and Order, 98 FCC 2d 1191, 1194 (1984) (concluding that Western Union is non-dominant in its domestic interstate, interexchange services and is subject to streamlined tariff regulation); International Competitive Carrier Policies, 102 FCC 2d 812, 833, 844 (1985) (concluding that Western Union is non-dominant in international non-IMTS services and is subject to streamlined tariff regulation). ITT appears to disagree with the Commission's finding that Western Union is non-dominant in the domestic telex market. If ITT wishes the Commission to reexamine Western Union's status, it should submit a petition for rulemaking pursuant to Section 1.411 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.411 *et seq.*

[9] ITT argues that the Commission modified this section as it applies to non-dominant *international* carriers and that petitioners need only show that the "injury to competition which would result if the tariff were allowed to take effect is greater than the harm to the public from not allowing the tariff to take effect." *See* ITT October 31 Comments at 5 & n.* (citing International Competitive Carrier Policies, CC Docket No. 85-107, Report and Order, 102 FCC 2d 812 (1985)(*International Competitive Carrier*)). ITT's contention is incorrect. The Commission clearly adopted for international carriers the same standards that apply to domestic carriers. *International Competitive Carrier*, 102 FCC 2d at 843-44 (Commission indicates that "streamlined rules developed in the domestic *Competitive Carrier* proceeding" are being adopted for non-dominant international carrier). Even if the Commission had modified the international standard, however, the domestic standard would apply in this case as ITT has contested Western Union's proposed domestic telex rates, which form the basis for both domestic telex charges and landline haul charges associated with international calls.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-419

Amendment of Section 73.202(b)	RM-5430
Table of Allotments,	
FM Broadcast Stations.	
(Centre, Alabama)	

NOTICE OF PROPOSED RULE MAKING

Adopted: October 15, 1986 Released: November 17, 1986

By the Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Cherokee Broadcasting Corporation ("petitioner") requesting the allotment of Channel 290A to Centre, Alabama, as that community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. A staff engineering study reveals that Channel 290A can be allotted to Centre, Alabama consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules provided the transmitter site is restricted to an area at least 2.6 kilometers (1.6 miles) west of Centre to avoid short spacing to a rule making proposal at Canton, Georgia (RM-5086).

3. Since the proposal herein could provide a first local FM service to Centre, the Commission believes it is appropriate to elicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Centre, Alabama	—	290A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before January 8, 1987, and reply comments on or before January 23, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Gary S. Smithwick, Esq.
Keith & Smithwick
1320 Westgate Drive
Winston-Salem, NC 27103

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections* 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Nancy V. Joyner, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a

counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTE

[1] The proposal meets the spacing requirements based on the construction permit issued to Station WSTH, Alexander City, Alabama, to reclassify its facilities to Class C1 status (File No. BMPH-850712). Should we ultimately allot Channel 290A to Centre, as proposed, the window period for filing applications therefor will be postponed until such time as Station WSTH(FM) becomes licensed as a Class C1 facility.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-420

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Atwater, Minnesota)	RM-5446

NOTICE OF PROPOSED RULE MAKING

Adopted: October 15, 1986 Released: November 17, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for rule making filed by Norman Jones ("petitioner"), requesting the allocation of FM Channel 231A to Atwater, Minnesota, as that community's first FM broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application for the channel.

2. We believe the proposal warrants consideration. Channel 231A can be allocated in compliance with the minimum distance separation requirements provided there is a site restriction 5.5 kilometers (3.4 miles) south of the community. The site restriction will prevent a conflict with a construction permit for Channel 229, Station WAYL(FM), Minneapolis, Minnesota, and to Channel 231A (vacant) at Little Falls, Minnesota.

3. In view of the fact that the proposed allocation could provide a first FM broadcast service to Atwater, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
Community	Present	Proposed
Atwater, Minnesota	—	231A

4. The Commission's authority to institute rule making proceedings, showings required, cutoff procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before January 8, 1987, and reply comments on or before January 23, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

A. L. Stein
Colorado Building - Suite 915
1341 G Street, N.W.
Washington, D.C. 20005

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend* Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *exparte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection

with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments. reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-428

Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (Peoria, Illinois)	RM-5335

NOTICE OF PROPOSED RULE MAKING

Adopted: October 20, 1986 Released: November 17, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for rule making filed by Donald L. Markley ("petitioner") proposing to amend the Television Table of Assignments (Section 73.606(b) of the Rules) by switching the reservation for noncommercial educational Channel *59 to Channel 47. Channel 47 is presently licensed for noncommercial educational use by Station WTVP(TV), Peoria, Illinois.

2. In support of the proposal, petitioner states that the licensee for Station WTVP(TV) requested, and was granted, a construction permit to operate Channel 47 in the interest of obtaining as low a channel number as possible, although the Table designated Channel *59 for educational use at Peoria. Petitioner claims that there is an available site on which Channel 59 can be utilized for commercial use, and states his intention to apply for use of the channel if this proposal is adopted.

3. In view of the above, we shall invite comments on the proposal to amend the Television Table of Assignments, Section 73.606(b) of the Rules with respect to Peoria, Illinois, as follows:

	Channel No.	
City	Present	Proposed
Peoria, Illinois	19, 25+, 31+, 47-, *59+	19, 25+, 31+, *47-, 59+

4. IT IS ORDERED, That the Secretary shall send a copy of this *Notice of Proposed Rule Making* by Certified Mail, RETURN RECEIPT REQUESTED, to the licensee for Television Station WTVP(TV), Peoria, Illinois, as follows: Illinois Valley Public Telecom, 1501 West Bradley Avenue, Peoria, Illinois 61625.

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

6. Interested parties may file comments on or before January 8, 1987, and reply comments on or before January 23, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Donald L. Markley
206 North Bergan
Peoria, Illinois 61604
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Assignments, Section 73.606(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule* Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

8. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel assignments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that

parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding. and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-429

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Kaplan, Louisiana)	RM-5336

NOTICE OF PROPOSED RULE MAKING

Adopted: October 20, 1986 Released: November 17, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Mid-Acadiana Broadcasting, Inc. ("petitioner"), licensee of Station KMDL(FM), Channel 249A, Kaplan, Louisiana, requesting the substitution of Channel 247C2 for Channel 249A and modification of its license to specify operation on the Class C2 channel.

2. Channel 247C2 can be allocated to Kaplan in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided an application (BMPH-8507031D) filed by Station KAYD(FM), Channel 248C, Beaumont, Texas, to change its facilities to Class Cl status is approved by the Commission. At present the proposal is short spaced by 26.9 kilometers to Station KAYD(FM) as a full Class C station. Therefore, the finalization of this proposal is contingent upon the issuance of a license for Station KAYD(FM) to beoome a Class C1 station.

3. In view of the Commission's recent action in MM Docket No. 85-313, 51 FR 20290, June 4, 1986, it is no longer necessary to demonstrate the avail- ability of an additional equivalent channel where, as here, petitioner proposes to upgrade its facilities on an adjacent channel and we propose the direct modification of license of Station KMDL(FM), Kaplan, Louisiana, to specify operation on Channel 247C2. The Commission s modification policies as expressed in *Cheyenne, Wyoming*, 62 FCC 2d 63 (1976) and *Modification of FM and TV Station Licenses*, 98 FCC 2d 916 (1984) are not applicable in this type of rule making proceeding. See Section 1.420(g) of the Rules. Therefore, we shall not consider other expressions of interest for Channel 247C2 at Kaplan, Louisiana.

4. Accordingly, since the proposed allocation could provide the community with a first wide area coverage FM channel, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Kaplan, Louisiana	249A	247C2

5. The Commirsion's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before January 8, 1987 and reply comments on or before January 23, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Bradford D. Carey, Esq.
Fawer, Brian, Hardy & Zatkis
700 Camp Street
New Orleans, LA 70130-3702
(Counsel to Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making* to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

8. For further information concerning this proceeding, contact D. David Weston, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments, An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are pre-

sented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments ; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs or other documents shall be furnished the Commission.

6. *Public Inspection of* Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-430

Amendment of Section 73.202(b). RM-5310
Table of Allotments, RM-5310
FM Broadcast Stations.
(Bogue Chitto, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 20, 1986 Released: November 17, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for rule making filed by Bogue Chitto Broadcasting Company ("petitioner"), requesting the allocation of FM Channel 225A to Bogue Chitto, Mississippi, as that community's first FM broadcast service. Petitioner submitted information in support of the proposal and states its intention to file an application for the channel.

2. Section 307(b) of the Communications Act of 1934, as amended, requires that allotments be made to "communities" as a geographically identifiable population grouping. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. However, absent such recognizable community factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic or cultural indicia to qualify it as a "community" for allotment purposes. See, e.g. *Ansley, Alabama*, 46 Fed. Reg 58688, published December 3, 1981; *Cascade Village, Colorado*, 48 Fed. Reg. 19917, published May 3, 1983., *Red Rock, Georgia*, 48 Fed. Reg. 36170, published August 9, 1983, and cases cited therein. Here Bogue Chitto is not listed in the 1980 U.S. Census. Therefore, petitioner should submit additional information regarding Bogue Chitto to demonstrate whether it has any business, social organizations, or governmental units that identify themselves therewith.

3. In view of the forgoing, and based on the information submitted by petitioner, the Commission does not believe that a final determination can be made as to the status of Bogue Chitto, Mississippi, as a community. We believe it is appropriate to further investigate this matter through the solicitation of comments. Therefore, petitioner is requested to provide information to demonstrate how Bogue Chitto may qualify as a community for allotment purposes.

4. A staff engineering study reveals that Channel 225A can be allocated to Bogue Chitto, Mississippi, consistent with the minimum distance separation requirements of Section 73.207(a) of the Commission's Rules, provided there is a site restriction 1.6 kilometer (1 mile) northeast of the community. The site restriction will prevent a conflict with Station KQID, Channel 226, Alexandria, Louisiana.

5. Accordingly, the Commission seeks comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to the following community:

	Channel No.	
City	Present	Proposed
Bogue Chitto, Mississippi		225A

6. The Commission's authory to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

7. Interested parties may file comments on or before January 8, 1987 and reply comments on or before January 23, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Donald B. Brady
Bogue Chitto Broadcasting Company
623 Northwest Avenue
McComb, Mississippi 39648

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Table of FM Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making* to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 48 Fed. Reg. 11549, published February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel assignments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioners constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles G. Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(d)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding. (a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.) (b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket. (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied' by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission s Rules.)

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, brief r other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-135

In the Matter of

Licensing Space Stations in the
Domestic Fixed-Satellite Service

In the Matter of the Applications of

NATIONAL EXCHANGE, INC.	File Nos. 1824-DSS-P/LA-83 1825-DSS-P/LA-83 1826-DSS-P/LA-83 1827-DSS-P/LA-83 1828-DSS-P/LA-83
RCA AMERICAN COMMUNICATIONS, INC.	File Nos. 961-DSS-P/LA-84 962-DSS-P/LA-84 963-DSS-P/LA-84 964-DSS-P-84 965-DSS-P/LA-84 966-DSS-P/LA-84 967-DSS-P/LA-84 968-DSS-P/LA-84 969-DSS-P/LA-84 970-DSS-P/LA-84

For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 1986; Released: November 19, 1986

By the Commission:

1. We have before us Petitions for Reconsideration of our *Report and Order* in CC Docket No. 85-135[1] filed by National Exchange, Inc. (NEX),[2] RCA American Communications, Inc. (RCA),[3] Gannett Co., Inc. (Gannett) and Home Box Office, Inc. (HBO).[4] For the reasons set forth below, we deny the petitions for reconsideration filed by NEX and RCA and reaffirm our decisions in the above-captioned proceedings.[5] We have, however, adjusted our rules to the extent discussed below in light of Gannett's and HBO's petitions.

Background

2. On September 9, 1983, the Commission invited parties wishing to obtain authorizations for domestic fixed-satellite space stations to file satellite applications on or before November 7, 1983.[6] Notice was given at that time of the information required to be included in the applications.[7] In response to the *1983 Processing Order*, twenty-one entities filed 85 applications for satellites. After an initial review by the staff, public notice was given of the filing of these applications in March 1984. The public notice solicited comments on the individual applications as well as on the general processing procedures to be used in processing the applications.[8] Final comments were received in July 1984. After a detailed review of the applications and the extensive comments concerning the applications and processing procedures, it became evident that although many of the applicants met established qualification standards, many did not. To have set these applications for evidentiary hearing would have resulted in extensive delays, uncertainties and costs in providing satellite service to the public.[9] Thus, the Commission, in response to suggestions by commenters, decided to apply the existing criteria strictly to the pending applications and deny those applications which did not meet those standards.

3. To ensure that all applicants clearly understood the information we intended to use in applying financial qualifications and satellite utilization standards, the Commission issued a *Notice of Proposed Rulemaking* to codify these standards into a new Section 25.391 to our Rules and Regulations.[10] The *NPRM* specified that, if necessary, applicants should amend or supplement their pending applications in light of these proposed rules within thirty days so that we could act immediately on these applications once final rules were adopted.[11] Extensive comments and reply comments were received on the proposed rules and most applicants submitted information supplementing their pending applications. On July 25, 1985, we adopted final rules that were designed, among other things, to identify speculative applications that could have permitted those unqualified applicants to tie up orbital locations to the detriment of other entities able to proceed promptly with implementation of their systems. The penalty imposed by delaying qualified entities is a delay in the provision of satellite services to the public. As a result of the comments received, the rules adopted were more liberal than those proposed, and were simultaneously applied to grant or deny the applications of all applicants in the 1983 processing group. Several parties seek reconsideration of both the financial standards and the regulations regarding the assignment of orbital locations.

Financial Qualifications

1. Pleadings

4. NEX seeks reconsideration of the rule setting financial standards for licensing domestic satellite applicants. It argues that the Commission should apply the financial rules in Section 25.391 on a prospective basis only. Additionally, NEX seeks reconsideration of our decision in the *Report and Order* upholding the Common Carrier Bureau's denial of its motion to Separate Rulemaking and Adjudicatory Proceedings.[12] NEX further petitions for reconsideration of the *NEX Order* denying the domestic satellite authorizations sought by it and seeks grant of conditional construction permits similar to those granted to certain applicants in the previous processing group that were unable to demonstrate financial qualifications.[13]

5. NEX bases its claim that the Commission should reconsider its decisions on three grounds. First, NEX alleges that certain factual circumstances have changed since the July 25 adoption of the *1985 Report and Order* and the *NEX Order* that require a re-evaluation of the Commission's financial qualification rules and a change, at least, in how they are applied. Specifically, NEX states that the conclusion of the 1985 Space WARC and trade press reports of potential delay in the construction and launch of recently authorized satellites warrant reconsi-

deration of the rulemaking. It asserts that the trade press reports indicate that the financial qualification rule does not achieve the desired assurance that grantees will be able to proceed immediately with the construction of their satellite systems. NEX asserts that these recent developments argue for Commission reconsideration of the denial of its individual applications and that the Commission should grant NEX's applications using a conditional grant and milestone schedule approach.

6. Second, NEX asserts that the Commission erroneously premised the denial of its application on the assumption that NEX could acquire space segment capacity for its service offerings on a sale or lease basis from existing operators. NEX argues that because its satellite construction and operating plans are technologically unique, denial of its applications will prevent NEX from offering new technologies, marketing approaches and services on a retail basis to users.

7. Finally, NEX argues that the Commission violated the Administrative Procedure Act (APA)[14] by simultaneously adopting and applying "new" financial qualification requirements which were used to deny NEX's applications. NEX contends that the Commission erred by classifying the regulation as a "procedural" rule not requiring notice and comment, that the final financial qualification rules did not restate existing Commission policies, and that Section 553(d) of the APA prevented the Commission from making the proposed rules effective upon adoption.

8. Several parties oppose NEX's petition. They argue that the petition adds little to arguments previously raised by NEX and repeatedly rejected by the Commission. According to opponents, nothing has occurred since Commission adoption of the *1985 Report and Order* to warrant reconsideration of the rule. They also argue that the Commission based its denial of NEX's applications on the finding that it was not financially qualified and therefore did not consider the matter of NEX's proposed technology. Finally, opponents state that first the Common Carrier Bureau and later the Commission fully addressed and correctly rejected the arguments raised by NEX concerning the Commission's alleged violation of the APA.

2. Discussion

9. The principal issue raised by NEX's petition is whether the adoption and application of the financial rules in Section 25.391(b)-(d) violated the APA. NEX had raised many of these arguments in its Application for Review of the *June 5 Order*. These arguments were fully considered and rejected by the Commission in the *1985 Report and Order*, *supra* note 1, at para 37. Thus, NEX's petition for reconsideration of these general issues may be dismissed as repetitious pursuant to Section 1.429(i) of the Commission's rules.[15] We will nevertheless respond to NEX's renewed objections because doing so will not delay resolution of this proceeding. In short, although we disagree that the standards adopted in Section 25.391 are new, even if they were, the rules were adopted in strict conformity with the APA and with the due process rights of the domestic satellite applicants. All parties, including NEX, had a full and fair opportunity to comment on the proposed rules before final rules were adopted. Moreover, we acted well within our authority in making the rules effective immediately upon adoption.

10. In particular, NEX first argues that it was error to classify the licensing criteria in Section 25.391 as a "procedural" rule not requiring notice and comment under the APA. Although NEX does not clearly state the basis for its belief that the Commission classified the licensing criteria as procedural, NEX is apparently referring to the statement in the *1985 Report and Order* that "our requirement in this proceeding that applicants *submit particular information in documentation with their applications* pending completion of the rulemaking is only a procedural rule exempt from APA notice and comment provisions."[16] Only the submission of supplemental information – not the licensing criteria – was labelled "procedural." Failure to submit the requested information had no substantive impact on the status of any application until the completion of the rulemaking, when the rules were adopted. Moreover, our conclusion that the opportunity for applicants to supplement the information contained in their applications pending the completion of the rulemaking was a procedural rule was correct. It is also clear the Commission may properly request an applicant to submit any additional information that is pertinent to our disposition of its application.[17] In fact, the *1983 Processing Order* placed applicants on notice that they may be required to submit further documentation.[18] The additional information was used to complete the record and avoid the necessity for holding evidentiary hearings on ambiguous financial showings.[19] No action was taken with respect to any of the submitted information until the rulemaking was completed. Thus, the supplemental information was properly requested under the APA.

11. Moreover, because the financial rules codified established standards, they could have been immediately applied to the pending applicants.[20] We nevertheless solicited comment on the proposed rules. The solicitation of comments *per se* in no way evidences a change in policy. It would have been possible, based on the extensive comments received in response to the March 1983 *Public Notice* concerning the processing procedures together with our established financial standards, to adopt the same financial criteria proposed in the *NPRM*. However, before these policies and criteria were applied to the pending applications, we believed it prudent to provide parties with a final opportunity to comment so that any questions concerning the precise documentation needed to support our financial standard could be clarified before adoption. Thus, we reject NEX's assertion that by initiating notice and comment we "tacitly" acknowledged that the adopted rules substantively changed existing standards articulated in the *1983*

Processing Order.

12. However, because NEX argues at some length that we changed our policies, we will address this contention briefly. NEX's assertion that the rule changed established policy is based on its erroneous assumption that the *1983 Processing Order* "indicated that applicants would be entitled to an evidentiary hearing on the question of financial qualifications, and held out the promise of conditioned authorizations."[21] Despite the Commission's long history of requiring applicants to be financially solvent,[22] NEX insists that it relied, to its detriment, on an experiment with three applicants in the previous processing group.[23] There was no basis for this reliance. When issuing the three conditional authorizations in 1983, we emphasized that this approach was an experiment that

then existing circumstances allowed us to try.[24] All three entities issued conditional authorizations failed to obtain the requisite financing, and their authorizations were revoked in January and February 1985.[25] The Commission was required to undertake several administrative proceedings in cancelling the authorizations. In addition, contrary to NEX's assertion, we did not promise to award conditional authorizations to financially unqualified applicants. Rather, we indicated that we would request public comment on processing methods, including the "feasibility of strict criteria to determine licensing eligibility."[26] Thus, the language in the *1983 Processing Order* clearly indicated that applicants in the NEX group had no assurance that conditioned grants would be repeated. With the failure of this limited experiment, we have no reason to deviate further from our basic policy of requiring applicants to demonstrate clearly their financial qualifications in order to ensure that satellite services are delivered expeditiously to the public.[27]

13. In summary, the financial standards applied to the 1983 processing group were not new. Even if they were, however, all parties were provided, on at least two occasions, with notice and an opportunity to comment between the filing of the applications and Commission action on them. As we stated in our *June 5 Order* denying NEX's motion to separate rulemaking and adjudicatory proceedings and again in our *1985 Report and Order*,[28] our authority to apply interim application processing criteria pending the outcome of rulemakings is well-established, especially where there is a necessity for expeditious action on applications.[29] Thus, NEX has not persuaded us that our processing procedures were improper or that the rules should be applied on a prospective basis only.

14. In addition to its objections concerning the procedure by which we adopted the financial rules, NEX argues that a perceived urgency – pressing international considerations raised by the upcoming Space WARC – cannot justify the simultaneous implementation and application of the rules.[30] We reject NEX's assertions that the Commission failed to explain adequately the reasons for having the proceeding concluded by the commencement of Space WARC, and that the Commission had ample time since the *1983 Processing Order* to conclude the proceeding.

15. The processing time involved in this complex proceeding was not unreasonable. Twenty-one entities had filed 85 applications and voluminous comments were submitted, with final comments not filed until July 1984. Action was taken on the applications in July 1985. This processing time is commensurate with previous groups of applications. Moreover, NEX has not convinced us that we improperly relied on Space WARC considerations in simultaneously adopting and applying the rules.[31] During the Space WARC preparations, our key concern was how the definition of "existing systems" could ultimately affect the status of our domestic satellites in the international arena. To ensure that any procedure devised at the Space WARC would, at a minimum, protect the status of domestic satellites as existing networks, it was important to enter into negotiations with firmly committed domestic satellite licensees.[32]

16. Finally, NEX argues that changed factual circumstances since the adoption of the financial rules – specifically the conclusion of Space WARC and trade press reports of delay in implementation of authorized satellites – warrant reconsideration of the rules and a continuation of our experiment with conditional authorizations. These occurrences, however, are unrelated to the substance of the rules adopted in the *1985 Report and Order*. The financial rules were adopted to clarify long-standing criteria, and are necessary to enable us to evaluate the financial qualifications of space station applicants.[33] We find just as much need for the rules now as we did on July 25, 1985. The occurences pointed to by NEX do not justify any further experiments with conditional grants nor do they affect the substance or rationale of the rules – that domestic satellite licensees be able to construct satellites expeditiously. We affirm the financial rules adopted and deny NEX's petition for reconsideration of the rules.

17. We also deny NEX's request for reconsideration of the Commission order denying its individual applications. In its petition, NEX does not claim that it is qualified under the financial qualification standards.[34] Rather, NEX argues that the Commission's denial of its application was premised on the erroneous assumption that NEX could acquire space segment capacity for its service offerings on either a sale or lease basis from an existing operator. NEX argues that due to the unique design of its satellite, it cannot use the capacity of an existing operator to provide its proposed technology.

18. NEX is apparently referring to our discussion in the *1985 Report and Order* indicating that financially unqualified applicants might enter the retail market by acquiring capacity from existing operators. This observation, however, was not a basis for denying NEX's application.[35] Rather, this general discussion was meant to identify ways small businesses or start-up companies could participate in the domestic satellite business.[36] In denying NEX's application, we relied solely on NEX's lack of demonstrated financial qualifications to construct a satellite sytsem requiring an investment of over $300 million. NEX had negligible current assets or operating income, while its financing agreements were contingent upon future performance and guarantees. Because there was no assurance NEX could obtain the funds necessary to finance its system, its applications were denied as failing to demonstrate NEX's financial qualifications pursuant to Section 25.391.[37] Thus, any potential means of NEX's future participation in the domestic satellite market, whether by reapplying for its own system once it can satisfy the financial criteria of our rules or by leasing capacity on another operational system, was irrelevant to the 1985 action on its pending applications. We therefore deny NEX's petition for reconsideration of the *NEX Order*.

Expansion Satellites

1. Pleadings

19. RCA seeks reconsideration of Section 25.391(g) of the rules which provides that any applicant with three authorized but unlaunched satellites in a particular band cannot be granted an additional orbital assignment. At the time its applications were acted upon, RCA had authorizations for three as yet unlaunched 12/14 GHz satellites. The rule was applied to deny its request for an additional 12/14 GHz satellite.[38] RCA argues that because two of its three satellites were to be launched within months after the rule was adopted, the capacity of its first satellite is totally committed, the capacity of the second is expected to be committed shortly, and there is no reason to not expect that the capacity of the third satellite will be committed prior to its launch in 1987, the application of

the rule was arbitrary and capricious.[39] RCA argues that the rule to deny RCA's request should be rescinded, but, failing that, at a minimum, should contain some provision for accommodating extenuating circumstances such as these. Additionally, RCA argues that it did not have fair notice that the rule was to be adopted. It states that had notice been provided, it would have expressed its concerns and provided the Commission with a list of extenuating circumstances that should preclude the rule from being applied.

20. Hughes and FASSC oppose RCA's petition. They argue that the Commission provided ample justification for the promulgation of the contested rule and that all parties had ample opportunity to comment. According to Hughes and FASSC, the rule is a fair balance between the need for future planning certainty by existing operators and the need to make orbital capacity available to other operators with demonstrated need.

2. Discussion

21. RCA has not persuaded us that our rule specifying that an applicant with three authorized but unlaunced satellites in a particular band cannot be granted an additional orbital assignment in that band is unreasonable. This rule is based our established policy to grant new domestic satellite licensees an initial authorization to construct three satellites and launch two of these, and to require that applicants seeking expansion capacity, that is, additional orbital assignments beyond these two, to demonstrate that existing satellites are "essentially filled" before additional in-orbit satellites are authorized.[40] The rule adopted reflects a relaxation of a strict application of this policy by permitting an established operator to launch an additional satellite in an expansion band even if the operator has two other authorized but unlaunched satellites in that band. In fashioning this rule, we sought to achieve a proper balance between providing operators with planning certainty for expansion capacity and the need to prevent applicants from warehousing orbital assignments and blocking new entry by qualified companies at a later date.[41] RCA supplies no factual basis for us to conclude that this balance was incorrectly drawn. Thus, we reaffirm the rule as adopted.

22. Moreover, RCA has not convinced us that the rule was unfairly or inappropriately applied to it, and that a waiver of the rule is warranted. While no other applicant in the last processing round had as many authorized but unlaunched satellites as RCA, this circumstance does not undercut the rationale underlying the adoption of the rule. As we noted in our *1985 Report and Order*, "if a licensee has three or more authorized but unlaunched satellites, no additional satellites are needed to provide growth or restoral capacity."[42] In CA's case, nothing it has asserted has contradicted this determination. RCA merely alleges that it fully expects the capacity on the second satellite to be filled shortly, and expects that the capacity of the third satellite also to be filled before launch. We recognize that speculative showings of the need for expansion capacity may be unavoidable when a licensee has unlaunched satellites, and we consequently relaxed our policy that allowed a company only two unlaunched satellites in each band. As a result RCA's request for a third 12/14 GHz satellite was granted in April, 1983.[43] This capacity should be sufficient to meet future needs. RCA has provided no documentation of actual usage commitments to justify that its expectations of greater need will be met. Under the speculative showing provided we reaffirm the application of the rule to deny RCA's request for an additional 12/14 GHz band satellite.

23. We also find unpersuasive RCA's argument that it was denied an opportunity to comment on the rule as adopted. RCA bases this argument on the fact that the *NPRM* proposed no comparable rule. Rather, the proposed rule stipulated that to obtain an expansion satellite, the applicant was required to demonstrate that the satellite would be 80 percent filled within three years of launch. RCA and virtually all other commenters opposed this proposed codification of the "essentially filled" criteria for approving expansion satellites.[44] Because of the opposition, we were persuaded that a simpler formulation was desirable and could accomplish our purpose. While the precise rule adopted in the *1985 Report and Order* was not set out in the *NPRM*, the proposed rules and accompanying discussion provided adequate notice to RCA as to "[e]ither the terms or substance of the proposed rule or a description of the subjects and issues involved."[45] In opposing the rule as proposed in the *NPRM*, RCA had full opportunity to propose alternatives and cannot claim it was not heard.

Satellite Fill Requirements

1. Pleadings

24. RCA, Gannett and HBO object to Section 25.391(h) of the adopted rules, which provides that any essentially unfilled satellite may be required to be colocated with another in-orbit satellite. The vacated orbital position would then be available for reassignment. RCA argues that since the Commission rejected the specific numerical fill requirement proposed in the *NPRM*, the adoption of an "essentially filled" standard, which can be interpreted as more or less strict, was not justified. Gannett and HBO argue that the Commission should limit the applicability of loading standards to expansion satellites. They also argue the Commission underestimated the deletorious consequences of a colocation policy, asserting that this policy will impose costs, disruptions and uncertainties on customers and users. Both argue that the enormous cost of constructing, launching, insuring and operating a satellite will adequately deter any party from launching a satellite that will not be filled. Additionally, HBO asserts that, at a minimum, any licensee required to colocate a satellite must first be afforded a hearing since colocation is tantamount to a revocation of a satellite license. HBO also argues that users, as well as affected licensees and adjacent satellite operators, should be afforded an opportunity to participate in this hearing.[46]

2. Discussion

25. Section 25.391(h) affirms and codifies an established domestic fixed-satellite policy that unfilled in-orbit satellites may be required to be colocated with other in-orbit satellites and the vacated orbital position made available for reassignment.[47] As we stated in our *1985 Report and Order*, our basic objective is to ensure that the orbit spectrum is used efficiently to provide service to the public. Fundamental to this policy is the assurance that an underutilized system not block entry by qualified entities seeking an initial assignment or expansion capacity. We continue to believe that this policy is advisable.[48] We will, however, provide for certain modifications and clarifications of the rule in light of comments received.

26. As we indicated in the *1985 Report and Order*, licensees will have an opportunity to present their views or new information before any colocation is ordered to accommodate new satellites. While we believe any licensee facing colocation will certainly present the views of its users, we clarify that we will not preclude users from filing supporting data. Moreover, as we stated in the *1985 Report and Order*, factors such as the age of the in-orbit satellite, the type of services provided, and the technical configuration of the satellite need to be considered in evaluating fill.[49] However, we believe this information can be adequately provided through paper submissions and need not involve an extensive hearing as HBO suggests. All written submissions will be carefully considered before determining whether colocation is warranted.

27. We will, however, modify the adopted rule to indicate that fill of satellite systems as a whole, and not of any satellite in particular, will be used as the measure of determining whether colocation is appropriate. This modification is intended to avoid requiring newly launched satellites – which may be "essentially unfilled" – to be colocated if the rest of the licensee's system is operated at average or higher industry fill levels. Thus, we will amend Section 25.391(h) as follows: In the event that one or more applications satisfying the requirements of this section are ready for grant, any orbital location occupied by a satellite that is determined to be a part of a system that is not essentially filled may be cancelled and colocation of in-orbit satellites may be required. The Commission may take this action if, in so doing, it would allow the grant of pending applications which satisfy the requirements of this section. If a cancellation is made, the licensee will be afforded a period of 30 days to notify the Commission which of its assigned locations should be cancelled. Thus, when considering new applications, the effect of this rule as modified is to codify the Commission's option to require operators of unfilled satellites to show cause why colocation should not be required if it appears that a satellite system is being underutilized.

Regulatory Flexibility Analysis

28. By letter dated January 10, 1986, the U.S. Small Business Administration (SBA) requested the Commission to reconsider its certification under the Regulatory Flexibility Act which concluded that the adopted rules would not have an impact on small businesses.[50] After review of the arguments presented by the SBA, we conclude that our original assessment was correct.

29. In the *NPRM*, we certified that the proposed rules would not have a significant effect on a substantial number of small entities. This finding was based on the fact that construction, launch and operation of a satellite system costs approximately $300 million and any company with that amount of capital could not be considered a small business.[51] We have traditionally fulfilled our public interest obligation imposed by the Communications Act by ensuring that applicants for space station licenses are financially qualified to proceed with their proposals. The need for extensive resources has necessarily limited the number of companies operating domestic satellites in the geostationary orbit.

30. In its letter, the SBA does not raise any issue that it had not previously raised in its objection to our certification in the *NPRM* where we stated that the adopted rules would have no impact on small businesses. SBA objected to our certification, arguing that our rules would preclude participation by small businesses.

31. Regardless of the certification in the *NPRM*, we fulfilled the requirements of the *Regulatory Flexibility Act* in the *Report and Order*.[52] Despite the fact that we stated that the rules adopted were merely a clarification of prior policy and that our initial conclusion of no impact was correct, we nevertheless included a Final Regulatory Analysis. As we stated, the fact that companies without sufficient resources choose to file domestic satellite applications does not affect our responsibility to assure that licensees can implement their systems promptly upon grant and make services expeditiously available to the public. Moreover, the rules adopted best satisfy the purposes of the Regulatory Flexibility Act by assuring that satellite systems are implemented which, in turn, may be accessed by small businesses serving the public.

32. In addition, we carefully considered in the *NPRM* the other processing alternatives suggested by the SBA and found them to be inadvisable. As commenting parties had contended, the use of a lottery pool which included all applicants could result in the assignment of orbital locations to unqualified entities. This situation would cause delays in construction and implementation of service or even in the forfeiture of authorizations by companies unable to fulfill the representations in their applications. We noted that the use of lotteries could also result in the award of contiguous locations to incompatible systems, necessitating major design modifications for licensees. In addition, we found that administrative implementation of a new licensing scheme based on lotteries could cause further undesirable delays in service. Nothing in the Regulatory Flexibility Act requires the Commission to distort sound regulatory policy by creating licensing procedures to award space station authorizations to companies that are financially unqualified to pursue them.

33. Another objection raised by the SBA is that the rules eliminate the ability of small companies to obtain post-grant financing through methods such as transponder sales or credit or equity financial arrangements. However, our previous unsuccessful experiment with conditional grants to admittedly unqualified applicants demonstrates that such financing approaches do not work and it was this experience which prompted the Commission's original certification.[53]

34. As we discussed in the *1985 Report and Order*, there are other practical alternatives available to small businesses seeking to enter the domestic satellite market. The fact that a company may not be financially capable of constructing, launching and operating its own space station does not mean that it will be prevented from offering new technologies, marketing approaches and services to users. Many small companies are successfully operating in the domestic satellite industry. However, such small companies are more likely to be successful in first establishing themselves in services that do not require large capital investments. Start-up companies can acquire space segment capacity for their offerings by purchase or lease from existing operators.

35. Our principal concern is the provision of services to users which is dependent upon the availability of sufficient space segment capacity. This availability of capacity, on a wholesale basis to users or other carriers, or to end users on a retail basis may be frustrated by award of orbital locations to companies such as the 1983 conditional grantees who are unable to implement proposed

satellite systems immediately. The financing of a satellite system requires the ability to raise capital far beyond that of a small company. Awarding authorizations to these entities or using any of the other alternatives suggested by the SBA would neither increase the amount nor quality of satellite services available to the public.

Conclusion

36. Accordingly, IT IS ORDERED that the Petitions for Reconsideration filed by National Exchange, Inc. and RCA American Communications, Inc. ARE DENIED.

37. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by Gannett Co., Inc. and Home Box Office, Inc. ARE GRANTED to the extent set forth herein.

38. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, 47 U.S.C. §§ 154(i) and 303(r), that Part 25 of Chapter I of Title 47 of the Code of Federal Regulations IS AMENDED as set forth in the Appendix effective December 26, 1986.

39. IT IS FURTHER ORDERED that the Motion for Acceptance of Amendment and Waiver of the Cut-Off Rule filed by National Exchange Satellite, Inc. IS DENIED.

40. IT IS FURTHER ORDERED that the Amendment filed by National Exchange Satellite, Inc. IS DISMISSED.

41. IT IS FURTHER ORDERED that the Application for Review of the action in a letter from Chief, Domestic Facilities Division to Henry Goldberg (April 3, 1986) filed by National Exchange Satellite, Inc. IS DENIED.

42. IT IS FURTHER ORDERED that the Request for Leave to File Supplement to Petition for Reconsideration filed by National Exchange Satellite, Inc. IS DENIED.

43. IT IS FURTHER ORDERED that the Supplement to Petition for Reconsideration filed by National Exchange Satellite, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

Part 25 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 25 continues to read as follows:

AUTHORITY: §§ 25.101 to 25.531 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. § 54. Interpret or apply Secs. 101-104, 76 Stat. 419-427; 47 U.S.C. § 701-744.

2. Section 25.391 is amended by revising paragraph (h) to read as follows:

§ 25.391 Qualifications of domestic satellite space station licensees

* * * * *

(h) In the event that one or more applications satisfying the requirements of this section are ready for grant, any orbital location occupied by a satellite that is determined to be a part of a system that is not essentially filled may be cancelled and co-location of in-orbit satellites may be required. The Commission may take this action if, in so doing, it would allow the grant of pending applications that satisfy the requirements of this section. If a cancellation is made, the licensee will be afforded a period of 30 days to notify the Commission which of its assigned locations should be cancelled.

* * * * *

FOOTNOTES

[1] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (September 5, 1985) (*1985 Report and Order*).

[2] Oppositions to NEX's Petition for Reconsideration were filed by Hughes Communications Galaxy, Inc. (HCG), GTE Spacenet Corporation and GTE Satellite Corporation (GTE Satellite), Federal Express Corporation (Federal Express) and Ford Aerospace Satellite Services Corporation (FASSC). In its petition NEX also requests reconsideration of our order denying its applications for a 12/14 GHz domestic fixed-satellite system. National Exchange, Inc., 103 FCC 2d 863 (1985) (*NEX Order*). A response to NEX's Petition for Reconsideration was filed by Pan American Satellite Corporation (PanAmSat).

[3] RCA also requests reconsideration of our denial of its request for authority to construct, launch and operate a fourth 12/14 GHz domestic fixed satellite. RCA American Communications, Inc., 103 FCC 2d 852 (1985). Oppositions to RCA's petition were filed by FASSC and HCG.

[4] The Public Broadcasting Service (PBS), The National Association of Public Television Stations (NAPTS), and National Public Radio (NPR) filed joint comments supporting the views of Gannett and HBO.

[5] On February 21, 1986, National Exchange Satellite Inc. (NEXSAT), a company established after Burlington Northern, Inc. purchased 90 percent of NEX, filed the first of several pleadings pertaining to NEX's denied applications. In this *Order*, we deny NEXSAT's Motion for Acceptance of Amendment and Waiver of Cut-Off Rule, dismiss its Amendment, deny NEXSAT's application for review of the Common Carrier Bureau's decision to defer action on that amendment until this proceeding, and deny NEXSAT's Motion to Supplement its Petition for Reconsideration.

[6] Filing of Applications for New Space Stations in the Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983) (*1983 Processing Order*).

[7] *Id.* at Appendix B.

[8] *Public Notice*, Report No. DS-265 (released March 12, 1984).

[9] Because there were more applications for space stations than orbital locations available, we believed the *Ashbacker* doctrine prevented grant of any of these applications before action was taken on the deficient ones. Ashbacker v. FCC, 326 U.S. 327 (1945).

[9] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 19413 (May 8, 1985) (*NPRM*).

[11] The Commission noted that expediency in acting upon the applications was paramount because of the international considerations raised by the impending session of Space WARC. We noted that similar international considerations were identified

in NAB v. FCC, 740 F.2d 1190 (D.C. Cir. 1984) and supported concurrent consideration of applications and rulemaking issues. Because we found delay would disserve the public interest, we stated no extensions of time would be granted.

[12] Before the final rules were adopted in our *1985 Report and Order*, *supra* note 1, NEX filed a "Motion to Separate Rulemaking and Adjudicatory Proceedings and Request for Expedited Relief," requesting that we first adopt rules in a separate proceeding and then apply them to the applicants. On June 5, 1985, the Common Carrier Bureau denied NEX's request, explaining that the Commission's authority to apply interim application processing criteria pending the outcome of rulemakings is well-established. Licensing Space Stations in the Domestic Fixed-Satellite Service, Mimeo No. 4971 (released June 5, 1985) (*June 5 Order*).NEX again opposed this two track processing that required applicants to conform their applications during the pendency of the rulemaking procedure when it filed comments in the *NPRM*, and reiterated these arguments in an Application for Review of the Bureau's June 5 decision. In the *Report and Order*, we rejected NEX's procedural arguments, affirming the Common Carrier Bureau's denial of NEX's motion. *1985 Report and Order*, at paras. 29-41.

[13] In May, 1985, NEX scaled back its satellite system request, asking authority to construct, launch and operate two rather than four 12/14 GHz satellites, with a third satellite to be built as an on-ground spare. Based on NEX's inability to demonstrate its financial qualifications for its proposed three satellite system, its request was denied.

[14] 5 U.S.C. § 500 *et. seq.*

[15] 47 C.F.R. § 1.429(i).

[16] *1985 Report and Order*, *supra* note 1, at note 60 (emphasis added).

[17] *See* 47 U.S.C. § 308. ["The Commission, at any time after the filing of such original application . . . may require from an applicant . . . further written statements of fact to enable it to determine whether such original application should be granted of denied . . . ."]

[18] *1983 Processing Order*, *supra* note 6, at para. 4.

[19] *C.f.* Bilingual Cultural Coalition on Mass Media v. FCC, 595 F. 2d 621, 629-630 and note 34 (D.C. Cir. 1978).

[20] *See June 5 Order*, *supra* note 12, at para. 6.

[21] Petition at 15. NEX actually appears to concede that it was aware of our financial standards. It states that our *1983 Processing Order* "gave applicants reason to believe that conditioned construction permits *might* be issued to those not meeting the financial standards as of the date of the FCC's decision." Petition at 3 (emphasis added).

[22] In Domestic Communication Satellite Facilities, 35 FCC 2d 844, 850 (1972), the Commission stated that all domestic fixed-satellite applicants must demonstrate their financial ability to proceed with the implementation of their systems promptly upon grant. This was later affirmed and elaborated on in Domestic Fixed-Satellite Service, 90 FCC 2d 1, 2 (1982), and the 1983 *Processing Order*, *supra* note 6, at 1262.

[23] In 1983, the Commission issued licenses to three admittedly unqualified applicants based on their representations that they could arrange financing once they were issued construction permits. These authorizations were conditioned upon the companies obtaining requisite financing within a specified time. Failure to do so would render the authorizations null and void. Advanced Business Communications, Inc., 94 FCC 2d 1 (1983); Rainbow Satellite, Inc., 94 FCC 2d 437 (1983); United States Satellite Systems, Inc., 94 FCC 2d 462 (1983).

[24] In the *1983 Report and Order*, 54 Rad. Reg. 2d (P & F) 577 (1983), we stated that until that time we had not needed to discuss exhaustively the financial qualifications of domestic satellite licensees because the financial resources of past applicants had made it self-evident that they were fully capable of constructing and launching their proposed systems. *Id.* at para. 60. Rather than conducting lengthy hearings on financial qualifications of the three admittedly unqualified applicants in 1983, we issued conditional grants as an attempt to provide a more expedient test of an applicant's ability to finance its system. We emphasized, however, that this experiment was limited in scope, specifically, that we were "not opposed to trying [conditional authorizations] for the current group of applications." *Id.* at paras. 62-63. We also indicated our intention "to assess our experiences with [these] conditional grants to applicants who have not firmly demonstrated their [financial] qualifications to determine if our domestic satellite policy objectives have been furthered by [this] administrative approach." *1983 Processing Order*, *supra* note 6, at note 9.

[25] Advanced Business Communications, Inc., FCC 85-57 (released February 27, 1985), *recon. denied*, FCC 85-392 (released August 29, 1985); Rainbow Satellite, Inc., Mimeo No. 2583 (released February 14, 1985), *recon. denied*, FCC 85-393 (released August 29, 1985); and United States Satellite Systems, Inc. (released February 14, 1985), *recon. denied*, FCC 85-394 (released August 29, 1985).

[26] *1983 Processing Order*, *supra* note 6, at note 7. This approach would, in other words, deny all applications that did not demonstrate financial qualifications. We further stated that if, after employing various processing methods, there were more qualified applicants than orbital positions available to accommodate them, we might consider the possibility of holding evidentiary hearings. *Id.*

[27] As PanAmSat noted, international regulatory requirements make early showings of definitive financial arrangements impractical for private international satellite systems. Because these same constraints do not apply to domestic satellite systems we reject NEX's argument that the standards applied to international and domestic systems should be identical.

[28] We find that NEX's reliance on Chamber of Commerce of the United States v. OSHA, 636 F.2d 464 (D.C.Cir. 1980) to support its claim that the Commission violated the APA is misplaced. In that case, the Court of Appeals held that OSHA was in error when it changed a codified policy and applied it retroactively without providing notice and an opportunity to comment. Here, however, contrary to NEX's claims, we did not effect an "about-face" from our *1983 Processing Order*, 93 FCC 2d 1260 (1983), nor did we adopt financial rules without benefit of notice and comment.

[29] *See* NAB v. FCC, 740 F.2d 1190 (D.C. Cir. 1984); Domestic Communications Satellite Facilities, 22 FCC 2d 86 (1970), 35 FCC 2d 844 (1972), *recon. in part*, 38 FCC 2d 665 (1972); Geostar Corporation, FCC 84-319 (released September 7, 1984). We find NEX's attempt to distinguish these cases unpersuasive. NEX argues that the first case did not operate to bar the grant of authority to applicants. This was not, however, the court's focus. In NAB v. FCC, the court stated that as long as the applicants had a full and fair opportunity to be heard, as have the applicants in this proceeding, that the procedures were acceptable. The second case did not simultaneously apply new standards to pending applications, but rather gave applicants advance notice of the standards and an undefined length of time within which to conform. In this proceeding, applicants also received notice of the standards and had 30 days in which to conform their applications. Finally, NEX agrees that the last case involves analogous procedures. We do not agree with NEX, however, that because no reviewing court has passed upon the questions of "fundamental fairness and due process," this case is not a proper precedent.

[30] 5 U.S.C. § 553(d) requires that publication of a rule shall not be made less than 30 days before its effective date except when, among other things, good cause is found and published with the rule. 5 U.S.C. § 553(d)(3). *See* Citizens to Save Spencer County v. EPA, 600 F. 2d 844, 879-891 (D.C. Cir. 1979).

[31] In support of this assertion, NEX states that the National Telecommunications and Information Administration (NTIA) contends in its comments regarding the *NPRM* that a few months of delay in granting satellite licenses would have procedural fairness benefits. NTIA did not, however, address Space WARC considerations in its comments. We continue to believe that these considerations provided ample justification for the procedures employed in this proceeding.

[32] This concern, similar to the concern exhibited over DBS requirements for RARC-83, is consistent with the Commission's objective to have authorized systems to protect the U.S. interests in orbital locations at international conference. *See* NAB v. FCC, *supra* note 27.

[33] With respect to trade press reports of licensee delay in construction, we do not see why the possibility that some licensees will not meet the launch dates specified in their authorizations argues for a looser financial standard to be used. The conditional grant approach that NEX endorses has not only proven unsuccessful and time consuming, but would have been inappropriate for the last processing group because more applications were filed than available orbital locations. We continue to believe that strict financial standards with required construction milestones are the most effective mechanism to ensure that proposed satellites are timely constructed and launched. Any licensee failing to meet the implementation dates specified in their grants will have their authorizations revoked unless an extension of time request is granted due to circumstances beyond the licensee's control.

[34] On May 5, 1986, National Exchange Satellite, Inc. (NEXSAT), a wholly-owned subsidiary of NEX, filed a Request for Leave to File a Supplement to Petition for Reconsideration (Supplement). NEXSAT states in December 1985, 90% of the equity in NEX was acquired by Burlington Northern, Inc. (BNI). On February 21, 1986, NEXSAT filed an amendment to NEX's denied applications reflecting the transfer of control to BNI, BNI's commitment to the proposed satellite system, and BNI's financial qualifications under Section 25.391 of our rules. NEXSAT argues that because it is now able to demonstrate that it is financially qualified, there is an alternative ground for reconsideration of the denial of NEX's applications. We dismiss NEXSAT's supplemental petition for several reasons. First, permitting NEXSAT's amendment, filed some 7 months after the Commission took final action on its application, would impede the orderly processing of domestic satellite applications by precluding administrative finality and creating situations of mutual exclusivity. Additionally, permitting NEXSAT, in essence an entirely new applicant, to have its application processed as if it had been filed November 7, 1983 instead of on February 21, 1986 would be unfair to other applicants filing in the last group whose applications were denied, and to future applicants that will be considered in the next processing group. Finally, we note that two applicants, RCA and Columbia Communications, Inc., have petitioned for reconsideration and applied for court review, respectively, of the Commission's denial of their applications for 12/14 GHz band satellites. Indeed, RCA, like NEX, can argue that changed circumstances warrant a grant of its application. However, only one orbital location is currently identified as being available for a 12/14 GHz satellite. *See 1985 Assignment Order*, 50 Fed. Reg. 35228 (August 30, 1985). Thus, either permitting all applicants to submit curative amendments or allowing applicants that have petitioned for reconsideration to argue that changed circumstances warrant a grant of their denied applications, would lead to a mutually exclusive situation under current circumstances. For these reasons, we will not accept NEX's "curative" amendment.

[35] Moreover, other applicants, such as Martin Marietta, also proposed satellite designs using spot beam technology. Although the NEX design may be somewhat superior in terms of radiated power and receiver sensitivity, we found that this did not constitute sufficient grounds to waive our procedures when processing NEX's application.

[36] In fact, similar language was included in the nullification orders of Rainbow Satellite, Inc. and United States Satellite Systems, Inc., *supra* note 23. *See also* discussion regarding the regulatory flexibility analysis included in the *Report and Order* at paras. 29-34, *infra*.

[37] To demonstrate its financial qualifications, NEX asserted that it planned to raise $60.8 million through equity placement and $249.7 million through debt financing. An option agreement with BNI granted BNI an option to purchase up to 35% of the equity securities to be issued by NEX. There was also an agreement alluded to in a letter from a BNI officer that indicated a certain amount of debt financing would be forthcoming if approved by the Board of Directors. Arianespace was also to commit $55.86 million to the project if NEX could make the appropriate guarantees to a pool of European banks. *NEX Order*, *supra* note 2, at paras. 3-9.

[38] RCA American Communications, Inc., *supra* note 3. RCA had requested authorization for three additional 12/14 GHz satellites, two to be launched after 1990. Its request for the post-1990 satellites was denied on the basis of our policy that no authorizations would be granted in 1985 for satellites to be launched after 1990 since launches scheduled more than five years after authorization were too speculative and did not conform to our policy that licensees proceed expeditiously with construction and launch of authorized satellites. RCA does not seek reconsideration of this portion of the order.

[39] Opponents to RCA's petition point out that RCA provided no specifics regarding the committed capapity of its first two satellites. In response, RCA lists the customers to whom the capacity of its first 12/14 GHz satellite is committed, indicates that the capacity of the second is virtually committed pursuant to an agreement that would be signed shortly and reiterates its expectation that the capacity of its third satellite would likewise be filled.

[40] *See, e. g., 1983 Report and Order*, *supra* note 24, at para. 81; 1980 Orbit Assignment Order, 84 FCC 2d 584, 603 (1981).

[41] This policy has enabled orbital assignments in the last two processing groups to be made to new entrants as well as existing operators seeking expansion capacity.

[42] 50 Fed. Reg. 36071 at note 42.

[43] RCA American Communications, Inc., 94 FCC 2d 441 (1983).

[44] In fact, RCA urged us to adopt rules "relat[ing] solely to pre-launch activities or standards and not to the post-launch operational aspects of the satellite industry." RCA Comments at 10. The rule we adopted did just this.

[45] 5 U.S.C. § 553(b)(3).

[46] PBS, NAPTS and NPR filed comments supporting the HBO and Gannett petitions and especially urging the Commission, if it does not eliminate the rule, to adopt HBO's suggestion and provide a hearing opportunity to transponder owners and users as well as the satellite licensee before any relocation occurs. HBO asserts that this hearing will necessarily be long and complex.

[47] *1983 Report and Order*, *supra* note 24, at para. 84.

[48] Early satellite system planning often contemplated an in-orbit satellite that carried no regular traffic but was dedicated to be continuously available at a separate orbital location to

back-up other satellites in the system in the event of an in-orbit failure. With increasing congestion of the geostationary orbit, this operational concept has become more difficult for the Commission to endorse. Other methods of planning for contingencies of in-orbit failures, such as marketing preemptible transponders or colocating in-orbit spares, are feasible. In addition, we should not permit in-orbit satellites that have failed to achieve growth forecasts or have lost customers to competitors block entry by new applicants. We find such circumstances provide an allowable basis to review an operator's utilization of assigned orbital locations when we are considering new applications to launch satellites.

[49] *1985 Report and Order*, *supra* note 1, at note 41.

[50] It is not clear if this letter was filed as formal Petition for Reconsideration or as support for a pending petition. In any event, it is clearly untimely. *See* 47 C.F.R. § 1.429. Despite its procedural defects, we will nevertheless consider the letter as informal comments and will address the arguments raised by the SBA. *C. f.* 47 C.F.R. § 21.30(b),(c).

[51] The Commission's certification also referred to a more detailed discussion of the reasons why conditional grants and other alternatives suggested by the SBA were not feasible. *NPRM*, *supra* note 10, at para. 17. Thus, the certification was adequately supported. *See* Sargent v. Block, 576 F.Supp. 882 (D.D.C. 1983).

[52] The statute requires that an agency discuss the impact of its rule on small entities as well as describe alternatives to minimize such impact. *See* Small Ref. Lead Phase-Down Task Force v. U.S.E.P.A., 705 F.2d 506, 537 (D.C. Cir. 1983). This analysis was conducted in the *1985 Report and Order*, *supra* note 1, at Appendix D. *See* para. 34, *infra*.

[53] Even NEX, one of the applicants found to be financially unqualified in 1985, has since been acquired by a large corporation and has relied on this transaction to demonstrate the necessary financial support for its system.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MARR BROADCASTING COMPANY	MM Docket No. 84-647 File No. BRH-830314VY

For Renewal of License
of Station KXKX(FM)
Galveston, Texas

SAN JACINTO BROADCASTING CORPORATION Galveston, Texas	MM Docket No. 84-648 File No. BPH-830701AC

For Construction Permit

Appearances

Dennis F. Begley, Matthew H. McCormick, Cheryl A. Kenny and *James K. Edmundson*, on behalf of Marr Broadcasting Company; *Edward W. Hummers Jr., Vincent J. Curtis, Jr.*, and *Robert A. Depont*, on behalf of San Jacinto Broadcasting Corporation; and *Stephen T. Yelverton*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE

JOSEPH CHACHKIN

Issued: November 7, 1986 Released: November 18, 1986

Preliminary Statement

1. This proceeding involves the application of Marr Broadcasting Company (Marr) for renewal of license to operate Station KXKX(FM) on Channel 293C at Galveston, Texas and the mutually exclusive application of San Jacinto Broadcasting Corporation (San Jacinto) to construct a new station to operate on the frequency now occupied by Station KXKX: The applications were designated for comparative hearing by the Assistant Chief, Audio Services Division, on July 10, 1984. 49 Fed. Reg. 28919 (July 17, 1984). The issues to be resolved are: [1]

(1) To determine whether, in its requests to remain silent and in other filings with the Commission, Marr misrepresented the facts and/or lacked candor in seeking the Commission's authorization to permit Station KXKX to remain silent; [2]
(2) To determine whether, in its requests for extension of time to complete construction of its modified facilities and in other filings with the Commission pertaining thereto, Marr misrepresented the status of construction at the site. [3]
(3) To determine whether Marr misrepresented its intention in its request of November 14, 1983 for waiver of the main studio rule, Section 73.1125, to "temporarily" establish the main - studio of KXKX outside the city of license; [4]
(4) To determine whether Marr violated Section 73.3526 of the Commission's Rules pertaining to the maintenance of Station KXKX's public inspection file; [3]
(5) To determine the effect that the evidence adduced pursuant to the foregoing issues [Issues (1) through (4)], individually and collectively, has on Marr's basic and/or comparative qualifications to be a licensee of the Commission; [3]
(6) To determine whether Marr has violated Sections 73.316(c) and (d) of the Rules by intentionally constructing and operating a directional antenna without prior authorization, and, in light of the evidence adduced, the effect on Marr's basic and/or comparative qualifications; [4]
(7) To determine which of the proposals would, on a comparative basis, better serve the public interest; [5] and
(8) To determine, in light of the evidence adduced which of the applications should be granted.

2. Prehearing conferences were held on August 3, 1984, September 4, 1984, November 28, 1984, and January 3, 1985. The hearing consisted of field hearing sessions in Galveston, Texas on February 19, 20, and 21, 1985 with further hearing sessions being held in Washington, D.C. from May 21 through May 24, 1985, on May 30, 1985, and on July 8, 1985. The record was closed at the conclusion of the hearing session on July 8, 1985. The record was re-opened on July 22, 1985 to accept a stipulation of the parties and was then reclosed. Proposed findings of fact and conclusions were filed October 15, 1985; Replies were filed November 26, 1985.

Findings of Fact

Issue (1) - Misrepresentations as to Going Silent

3. Marr acquired the facilities and license of broadcast Station KXKX(FM) from Beacon Broadcasting Company on May 16, 1981 (Stip. 8). Marr operated the station for a little over six months. On December 2, 1981, Marr took the station off the air. The station resumed operations on December 2, 1983.

4. At the time of acquisition, the studio facilities for Station KXKX(FM) were located on the Flagship Pier, which is located within the city limits of Galveston. The City of Galveston is located on Galveston Island, which is separated from the mainland by Galveston Bay. At the time of acquisition, the transmitter tower for Station KXKX(FM) was co-located with Station KGBC(AM) [6] on Pelican Island, which is within the Galveston city limits, but which lies in Galveston Bay and separated from Galveston Island by the Galveston ship channel (Marr Ex. 3, p. 2; and Marr Ex. 21, attached map). When Station KXKX(FM) resumed operation in December 1983, the transmitter tower was re-located to Texas City, which is on the mainland, 10.5 miles by road from the Galveston city limits in the direction of Houston, which is about 35-40 miles away (Jt. Stip., Att. 33; and Marr Ex. 8, pp. 1-2). When the station resumed operations, the studio was

re-located to 2501 Palmer Highway, Texas City, Texas, which is at a separate location from the transmitter site (Jt. Stip., Att. 97 and 101).

5. On December 9, 1981, Marr notified the Commission that it had discontinued operation and requested permission to remain silent until April 3, 1982. Therein, it represented that discontinuance of the station's operation was for reasons beyond its control. Specifically, the reason given was the termination of Marr's studio lease in December 1981, and the need to locate a suitable replacement studio. Marr first learned on May 27, 1981, that the lease of its studio facilities on the Flagship Pier would be terminated. Marr then attempted to prevent the termination of the lease (Jt. Stip., Att. 2, 3). Although it could not prevent termination, it did gain an extension of time until February 1982, to vacate the premises (Marr Ex. 3, pp. 3-4; Marr Ex. 11, p. 1).

6. According to Michael Benages, Marr's then president and holder of 65.47% of its stock, [7] when he became aware of the problems with the Flagship Pier location, he began looking for other suitable studio facilities (Marr Ex. 3, p. 4). However, Patricia Neff, a Beacon Broadcasting Company employee who later became Marr's Station Manager, stated that Marr began looking for a new studio location prior to Marr's acquisition of the station (Tr. 252). Neff stated that prior to the closing Benages told her he was unhappy with the current studio and directed her to look for a new studio site. Neff was not told by Benages that the loss of the lease was the reason for finding a new site. Benages gave Neff no specifics as to what to look for in terms of dollars, footage, etc. (Tr. 250-51).

7. In the summer of 1981, Benages personally looked at an office building located at 2301 Strand in Galveston. [8] Benages was accompanied there by Neff, and by a real estate agent, William Cherry. According to Benages he decided not to lease space at this location because he considered the proposed rent of $950 to $1,200 per month to be too expensive. He wanted to have a ""barter" arrangement in lieu of rental payments, but the building owner was not very enthusiastic about the proposal (Marr Ex. 3, pp. 4-5). Neff, however, believed the Strand site adequate and was of the view Benages was favorably inclined. Benages never informed her the site was not acceptable (Tr. 257). Also, according to Cherry, Benages found the Strand site to be acceptable as to physical lay-out and costs, and made a verbal commitment to lease space there. Benages never signed the lease, even though it was offered on the agreed upon terms. Also, Benages refused to return Cherry's telephone calls or to give him any explanation for the failure to sign the lease (SJBC Ex. 10, pp. 6-8). [9]

8. According to J. Douglas Blackburn, then the station's General Manager, [10] the Strand site was unsuitable for the use of microwave to transmit from the studio to the tower site. Blackburn wanted a clear line-of-sight transmission path for the microwave signal. He believed that ocean-going ships docked in or moving through the Galveston ship channel and shipyard would block any line-of-sight to both the then existing transmitter tower at Pelican Island and then proposed tower at Texas City. [11] Based on this consideration, Blackburn advised Benages not to sign the lease for the Strand building (Marr Ex. 12, p. 2; Tr. 1094, 1101). Blackburn believed that using multiple microwave "hops" to circumvent the shipyard and ship channel would be too expensive and would cause a loss of fidelity in the microwave signal. Blackburn advised against using telephone lines to connect the studio with the tower because of problems with noise in the lines which they had encountered at the pier studio location (Tr. 1113-15). Blackburn is experienced in studio-to-transmitter microwave links. He has installed about sixty (60) and had encountered similar microwave problems across water paths in the Norfolk, Virginia area (Tr. 1111-12).

9. Thereafter, Marr considered other studio locations in Galveston, but found them unsuitable in terms of physical lay-out, costs, location, availability, and inability to utilize microwave. One of the locations specifically considered was at 23rd and M Streets in Galveston (Marr Ex. 3, p. 5). Blackburn personally looked at an unfinished building in downtown Galveston around October or November 1981. However, he was informed that this building would not be completed soon enough (Tr. 1096-97). Further Allen Levine, a co-owner of Marr, [12] was in Galveston looking for studio space just prior to the time the station went off the air, but found nothing suitable in terms of costs (Marr Ex. 11, pp. 1-2; and Tr. 796-97 and 1093).

10. Benages, Blackburn and Levine all testified that Marr was unable to find a suitable location for the KXKX studios (Marr Ex. 3 at 5; Tr. 796-97, 971, 1090). Cherry, however, testified that, based on his familiarity with conditions in the commercial real estate and office leasing market in Galveston during the period in question, the commercial office space sought by Marr was in fact available. Cherry reviewed his files and, as a result of that review, determined that, in the year 1981, there were available for lease in Galveston numerous commercial properties with a minimum of 1000 square feet available office space. [13] Cherry gave a representative listing of four such properties (SJBC Ex. 10 at 2-3). The approximate rental prices for the properties ranged between 50 cents per square foot per month plus utilities to 95 cents per square foot per month (*Id.* at 3).

11. Cherry stated that Galveston has historically had a "soft," office leasing market, that is, more space is available for lease and/or sale than the tenant market can absorb. *Id.* According to Cherry, such was the case between 1981 and 1984. *Id.* Owners of commercial properties in Galveston have traditionally attempted to cover only their overhead and obtain a "break-even" return on their investments. *Id.* In many cases, even this has proved impossible. *Id.* Cherry also testified that in 1982, 1983 and 1984, there were numerous commercial properties available in Galveston with a minimum of 1000 square feet of office space available. *Id.* In addition, Cherry's testimony was that, as of December of 1984, there was available for purchase a small office building in Galveston with approximately 2500 square feet which could be converted for use as a radio station's studio (*Id.* at 4). The price was approximately $150,000. According to Cherry, this property is representative of the properties throughout Galveston in 1981 which were available for purchase by Marr (*Id.* ; Tr. 547).

12. The station went dark on December 2, 1981 (Marr Ex. 1, p. 1). Neff stated that Blackburn advised her the station was being taken off the air for primarily budgetary considerations – that is, for financial reasons (Tr. 257-58). To the best of her recollection, Blackburn did not mention that the station was being taken off the air due to the loss of the studio site (Tr. 258-59). Blackburn testified that he recommended taking the station silent because of loss of the Flagship Pier site, economic problems and the contemplated construction of improved transmission fa-

cilities (Tr. 1081-82). According to Levine's written testimony, the reason for shutting down the station in December of 1981 was that it was believed that it would be a good idea to close down the station for the holidays, locate and move the studio to a new location, and resume operations after January 1, 1982 with a new format from the new studio site (Marr. Ex. 11 at 2). On cross examination, Levine admitted that, in discussing various alternatives, Marr considered not returning to the air until the improved facilities in Texas City were constructed (Tr. 821). In fact, Levine's letter of December 9, 1981 to Marr's communications counsel at the time, Clarence McKee, makes it clear that station KXKX was not going to be returned to the air until after the new transmitting facility had been built (SJBC Ex. 15, p. 3). Therein, Levine advised McKee that "|w|e therefore decided to terminate the operation of the radio station and in fact did so on December 3, 1981 [sic] intending to go back on the air relocated in the facility in Texas City for which we have a construction permit, *Id.*

13. On December 9, 1981, Marr's communications counsel McKee notified the Commission that the station had discontinued operation "due to reasons beyond its control which made continued adherence to its operating schedule impossible." (Jt. Stip. 1, 2, Att. 5). Stated as the sole reason for discontinuance of the station's operation was the termination of the Station KXKX studio lease by Gulf Resorts, Ltd. *Id.* There was no mention in the request to remain silent of economic problems or budgetary considerations; nor was there any mention of an intent to remain silent until new transmitting facilities for KXKX had been constructed. *Id.* In that December 9, 1981 filing, Marr also requested special temporary authority to remain silent until April 3, 1982 in order to attempt to locate suitable substitute studio facilities. *Id.* The McKee letter to the Commission indicated that Marr Broadcasting Company received a carbon copy of the letter.

14. Levine and Fieglein testified that, even after the station went silent, Marr continued to look for a replacement "interim" studio site (Marr Ex. 11 at 2-3, Tr. 466-468). According to Levine, sometime after Christmas of 1981, Marr determined that the best way for it to proceed was to remain off the air, to concentrate its efforts on studio at a recently acquired transmitter site in Texas City, Texas (*Id.* at 3). Directly contrary to Levine's testimony that it was not until after Christmas that Marr decided not to seek replacement studio in Galveston, Fieglein testified that it was his understanding, *in early December of 1981*, that Marr's plans were to move the studio to Texas City (Tr. 464). Indeed, prior to December 5, 1981, based on conversations with Levine and Benages, Fieglein advised a newspaper reporter that the studios were going to be moved to Texas City (Tr. 463- 65). Fieglein confirmed his understanding in a letter dated January 28, 1982 to the Small Business Administration, one of Marr's lenders. (Jt. Stip. 16, Att. 9). According to Fieglein, Marr had "made the managerial determination that, in order to eliminate the unnecessary and unjustifiable expenditure of a temporary studio location, it would close the station down during the temporary period while the new station location was being completed.- *Id.* Levine's December 9, 1981 letter to McKee, cited in paragraph 12, *supra*, confirms that understanding.

15. Vandy Anderson, the general manager of Station KGBC(AM) in Galveston, testified that, in the period of November-December of 1981 and January of 1982, Benages was advised of the availability of space for Station KXKX's studios at Station KGBC. Anderson stated that Station KXKX was originally part of the KGBC ownership and was co- located with Station KGBC (SJBC Ex. 8 at 2). In addition to the common studios, the KXKX transmitter and antenna were located at KGBC and remained so when Marr acquired KXKX. *Id.*

16. Sometime in November or December of 1981, after Anderson learned from the manager of the Flagship Hotel that KXKX had to leave the Flagship Pier because the hotel needed the space for parking, Anderson contacted Benages and offered him space at KGBC for the Station KXKX studios and offices (*Id.* ; Tr. 514). Anderson explained to Benages that KGBC had previously had an FM station in the space being offered and that Station KXKX could be set up right in the space where the FM station had formerly been (Tr. 514). Confirmation of Anderson's contact with Benages is contained in Anderson's January 14, 1982 letter to Benages (SJBC Ex. 8, p. 8). Anderson stated that Marr's use of the KGBC site for the KXKX studios would have relieved Marr of its monthly telephone line charges due to the co-location of Marr's studios and its transmitter at KGBC (*Id.* at 2). In addition, Anderson pointed out that there would have been economies resulting from the sharing of telephone circuits and news machines with Station KGBC (*Id.* at 2-3). The space that would have been available to Marr consisted of approximately 400 square feet, which would have been in addition to the space taken up by the transmitter. *Id.* at 3. Anderson stated that KGBC had the skeleton of space for an FM station in view of the previous co-location of KGBC and KXKX (Tr. 495). Two rooms were involved. One was in the "back room," the location of the KXKX transmitter. The other room, which was approximately 15 feet by 20 feet, was a soundproofed studio which had previously been used as the studio for Station KXKX when it was co-owned with KGBC (Tr. 496, 500).

17. Although Benages took the opportunity to store Station KXKX's studio equipment at KGBC, he rejected Anderson's offer to use the space for Station KXKX's studios so that the station could return to the air (SJBC Ex. 8 at 3). Anderson states that because Benages had rejected his (Anderson's) offer to use Station KGBC for KXKX'studios, rental terms for the studio were not discussed. (*Id.*).

18. The reason Anderson had offered the studio space to Benages was that Anderson felt that Station KXKX's return to the air would be in the economic interest of his station (KGBC) since Station KXKX rented space at KGBC for the Station KXKX transmitter and antenna. Payments on that lease (which were in arrears) would more likely be made if Station KXKX were on the air and operating. *Id.* Anderson stated that he personally renewed his offer of the KGBC space for use for the KXKX studios to Benages on several more occasions. *Id.* It was Anderson's experienced opinion that, if Marr had moved its studios to the KGBC facility, Station KXKX would have been returned to the air within matter of days (*Id.* at 4). [14]

19. Benages initially testified he did not consider the overtures by Anderson to be actual offers (Tr. 1597-99). Benages also claimed that the use of space at Station KGBC(AM) for a studio was unsuitable because of the small dimensions of the offered space, the possibility of fire from the nearby transmitter, lack of soundproofing, and the presence of snakes (Marr Ex. 3, pp. 5-6; and Tr.

1693-96). However, Benages subsequently admitted that he did not follow up on Anderson's offer because he was not interested in moving to the KGBC site (Tr. 1706-07).

20. As stated above in paragraph 12, Marr's principals linked the decision to keep Station KXKX off the air with Marr's modification of its technical facilities, which included the construction of a new transmission tower. As described by Blackburn, when Marr bought Station KXKX from Beacon Broadcasting Company, the Commission had approved a move to a transmitter site in Texas City with improved facilities (Marr Ex. 12 at 3). Blackburn stated that, thereafter, the transmitter site proposed by Beacon was condemned by the Texas City government for use as a sewage disposal facility. Marr then sought a new site. *Id.* Marr located a new site and, indeed, by an agreement dated December 2, 1981 (the same day Station KXKX was removed from the air), Marr entered into a contract to purchase property for a new antenna site in Texas City (the Dietel site) with the purchase subject to the condition that appropriate zoning approval for a radio station tower and studio building be approved (SJBC Ex. 19 at 2-3). Blackburn testified that he urged Benages to locate the Station KXKX studios at the transmitter site and that Benages ultimately agreed (Marr Ex. 12 at 4; see also Marr Ex. 3 at 6). Blackburn testified that he recommended to Levine that the station be taken off the air because of the loss of the Flagship Pier location, economic problems, and because of the contemplated construction of the improved transmission facilities (Tr. 1081-82). Levine's December 9, 1981 letter to McKee confirms that Marr had accepted this recommendation and did not intend to go back on the air until it had "relocated in the facility in Texas City" (SJBC Ex. 15 at 3). Blackburn testified that Benages did not like the idea of the station's being taken off the air, but Blackburn states that he (Blackburn) and Levine convinced Benages that "it was the smart thing to do." (Tr. 1082). Benages stated that, shortly after the station went off the air, Marr decided to keep the station off the air until the new transmitting facility, which would include a co-located studio, was constructed (Marr Ex. 3 at 6).

21. It was not until March 16, 1982 at the earliest, [15] however, that the Commission was first notified that the station was going to remain off the air in order to permit construction of the new tower and contemplated co-located studios (Jt. Stip., Att. 13). Prior to March 16, 1982, the sole reason given for the discontinuance of operation was the termination of the Flagship Pier Studio lease and the time required to obtain suitable substitute studio facilities for the station (Jt. Stip. 12, Att. 5). In its March 16, 1982 request (filed with the FCC) to extend the authority to remain silent, Marr for the first time in a Commission filing connected Station KXKX's remaining silent with the construction of the new facilities (Jt. Stip. 22, Att. 13).

22. By that time, however, Marr had begun to put out feelers for the sale of the station with the construction permit for the improved facilities. By letters dated February 19, 1982, Blackburn, advised two broadcast station brokers of Marr's valuation of the facility at $3.5 million with the construction permit for 100 kw at 750 feet (Jt. Stip. 20, Att. 11; Jt. Stip. 21, Att. 12). This was ten days after the zoning on the Dietel site was approved by the Texas City Zoning Board (Jt. Stip. 18, Att. 10; Tr. 472; Tr. 472) and the exact day that Marr took title to the Dietel property (Jt. Stip.).

23. Benages confirmed that Blackburn was authorized to make these overtures (Tr. 1011-12). In his written testimony, Benages stated that Marr decided, in approximately February of 1982, to investigate the possibility of selling Station KXKX (Marr. Ex. 3 at 12). He states that Marr "began looking for prospective buyers." *Id.* Furthermore, under a stock purchase agreement dated April 1, 1982, Benages represented to persons from whom he was purchasing Marr stock, that "it is his [Benages'] intention to attempt to sell the Corporation, or its assets, as soon sa he is legally able to do so to any ready, willing and able buyer that may come along." (Jt. Stip. 23, Att. 14 at p. 2-3). The proceeds of the sale of the corporation would be used to pay for the stock Benages was acquiring. *Id.* at 3.

24. While at the hearing, Benages claimed he never considered selling the station and that he was merely trying to determine the fair market value of the company (Tr. 1009, 1013]. However, Benages' assertion is also inconsistent with the counteroffer made by Marr (Jt. Stip. 29, Att. 20) in response to an offer made by broker Norman Fisher on behalf of Quantum Communications, Inc. (Quantum) (Jt. Stip. 24, Att. 15; *see also* Jt. Stip. 27, Att. 18; Tr. 1013-14). Under Benages' counteroffer by letter dated April 26, 1982, it was contemplated that Quantum would construct the new facility. Ouantum would provide a loan to Marr for $3.5 million dollars, a portion of which would be used to pay for the station's construction and the balance of which would be funded over five years, including the funding of the interest as outlined in Fisher's letter to Benages of April 13, 1982 (Jt. Stip. 24, Att. 15; Jt. Stip. 29, Att. 20 at 2). The contemplated loan agreement would have included warrants on the issued and outstanding shares of Marr's stock, which would be exercised upon either (1) the passage of the remaining two years of the FCC's three-year rule on transfers of control, or (2) the elimination of the three-year rule (Jt. Stip. 29, Att. 20 at 2). The price of the warrants was to equal the repayment of the loan and the exercise thereof was to be mandatory and automatic. *Id.* After reciting these proposed terms and some additional terms, Benages concluded the counteroffer by stating that "[i]f these terms are indeed of interest to your principal, *we are ready to proceed to contract." Id.* at 3 (emphasis added).

25. Subsequently, drafts of a loan agreement between Quantum and Marr, a construction contract for Marr's radio tower, and a voting trust agreement between Marr and the First National Bank of Chicago were transmitted under cover of a May 26, 1982 letter by Levine to Marr's communications counsel, Dennis Begley (Jt. Stip. 32, Att. 32). Later, by letter dated July 25, 1982, counsel Begley transmitted to Martin Levy of the law firm of Cohn and Marks (representing Quantum) a draft of a promissory note which was to be signed by Kenneth L. Dowe of Quantum in connection with "the KXKX Asset Purchase Agreement." (Jt. Stip. 36, Att. 27). Also exchanged between the parties' counsel, with the last exchange being made under cover of a July 6, 1982 letter from Begley, were drafts of an Escrow Agreement between Marr and Quantum and a Guaranty for payment of a promissory note (Jt. Stip., Atts. 28, 29, 30). The July 21, 1982 letter of Cynthia Carner of Marr to Walter Threadgill of Minority Broadcast Investment Corporation (one of Marr's lenders) confirmed that "[i]t is [Marr's] intention to sell the station at a net of $3 million, $3.5 million being the appraised value." Carner added, "We are currently waiting for a signed contract." (Jt. Stip. 41, Att. 32 at 2).

26. Contemporaneously with that letter, Carner, as Marr's "Assistant Secretary," signed Marr's Employer's Quarterly Federal Tax Return, dated July 20, 1982. Therein, Marr represented, pursuant to an instruction on the form, that final wages of the company were paid on May 30, 1982 and that the return was Marr's "final" return (Third Jt. Stip. at 3).

27. While the Quantum deal was never consummated, Marr continued to receive offers and explore a potential sale well into the fall of 1982 and even into 1983 (Jt. Stip., Att. 36, 37, 47). Indeed, in letter to Benages dated November 2, 1982, broadcast station broker Norman Fisher advised Benages that he would "try to comb the woods for other potential purchasers." (Jt. Stip. 47, Att. 38). In a letter dated February 2, 1983, the office of Marr's consulting engineer at the time (Lawrence Behr Associates, Inc.), transmitted, at the request of Benages, the tower height and power increase application of Marr to John Teeger of Founders Equity, Inc. in connection with the potential sale of KXKX (Jt. Stip. 56, Att. 47). Benages met with Teeger in late 1982 or 1983 (Tr. 1566-68).

28. Even though Marr's construction permit application for t height and power increase had been granted on July 27, 1982 (Jt. Stip. 42, Att. 33), the requests for bids for transmitting equipment were not mailed until February 2, 1983 (Jt. Stip. 53, Att. 44). Apart from filing requests for extensions of time with the FCC every six months, Marr took virtually no action during the license period directed toward the construction of the station.

Issue (2) - Mispresentations As to Status of Construction

29. On July 10, 1980, Marr signed an agreement to purchase station KXKX from Beacon Broadcasting Company (Jt. Stip. 2). The assets purchased included the pending application to move the station to location .55 miles north of Loop 197 in Texas City, Texas (BPH-80013A1) (Jt. Stip. 1, 2). Shortly thereafter, Marr's consulting engineer prepared a study of the relocation options for the station which showed how the station's coverage could be improved by relocating to a new site with a tall tower and an increase in power to 100 kilowatts (SJBC Ex. 18; Tr. 983-985). On March 17, 1981, the Commission granted the application for assignment of the license of KXKX (BALJ-801022G0) from Beacon to Marr (Jt. Stip. 5). On May 12, 1981, the Commission granted construction permit BPH-80031A1 and the assignment of license of KXKX and the purchase of the station's assets was consummated on or about May 16, 1981 (Jt. Stip. 7, 8). Benages, by letter dated August 26, 1981, employed Jay Blackburn as "General Manager in connection with the operation of Radio Station KXKX, Galveston, Texas and [to] do those things necessary to accomplish the expansion of the operation through the Houston area (Jt. Stip., Att. 4; Marr Ex. 3 at 2; Tr. 872-874, 1071).

30. Before the end of September, 1981, Marr inspected the site specified in the Beacon application and learned that it was no longer available because of the construction on the site of a Texas City sewage plant (Jt. Stip., Att. 26; Marr Ex. 3 at 7-9; Tr. 1004-1005; Tr. 1026- 1077). On February 5, 1982, Marr filed an application to modify construction permit BPH-800131A1 to specify a transmitter site located 0.4 miles northwest of the intersection of 146 and Loop 197 and 0.54 miles north-northeast of Texas City, Texas (File No. BMPH-830208AJ) (hereinafter sometimes referred to as the "Texas City" site). By FCC Form 701 filed on May 12, 1982, Marr requested a six month extension of time within which to construct the new facilities calling the Commission's attention to its pending application to modify the outstanding construction permit to move to the Texas City site and advising the Commission that it would "expeditiously proceed with construction as soon as its presently pending modification application is granted." (Jt. Stip., Att. 22; Marr Ex. 3, at 10-11). The application was signed by Benages on behalf of Marr. *Id.* Marr amended the pending application on May 27, 1982 and requested a waiver of Section 73.1125 of the rules to specify the main studio location of the station at the transmitter site in Texas City and beyond the city limits of Galveston, the city of license (Jt. Stip., Att. 24). The amendment was signed by Benages on behalf of Marr. *Id.* On June 9, 1982, the Commission extended the KXKX construction completion date to December 2, 1982 (Jt., Stip. Att. 25).

31. A request for expedited consideration of the pending modification of the construction permit was filed by Marr on June 17, 1982 (St. Stip., Att. 26; Marr Ex. 3 at 11). In the request, Benages stated the following on behalf of Marr:

> [A]n immediate grant of the KXKK application would facilitate a speedy restoration of service by KXKX. . . .Even with an immediate grant, several additional months will be required to complete the new facility.

Id. Construction permit BMPH-820208AJ specifying the Texas City site was granted on July 27, 1982 (Jt. Stip. 42, Att. 33; Marr Ex. 3 at 12). A condition was placed upon the construction permit requiring Marr to notify nearby AM station KYST when station construction of KXKX would commence. By letter of September 28, 1983, counsel for Marr advised KYST that construction would commence within the next two weeks (Jt. Stip. 83, Att. 73).

32. Subsequent to the grant of construction permit BMPH-820208AJ which authorized the facilities ultimately constructed by Marr for the operation of KXKX, Marr made the following filings with the Commission on the dates shown, which included specific representations with regard to the status of construction of KXKX:

(a) Extension of authority to remain silent, March 16, 1982 (Jt. Stip. 22, Att. 13).
(b) Form 701, extension of time to construct, May 13, 1982 (Jt. Stip. 31, Att. 22).
(c) Request for expedited consideration, June 17, 1982 (Jt. Stip. 35, Att. 26 at 2-3).
(d) Extension of authority to remain silent, July 13, 1982 (Jt. Stip. 40, Att. 31).
(e) Extension of authority to remain silent, November 5, 1982 (Jt. Stip. 48, Att. 39).
(f) Form 301, extension of time to construct, December 2, 1982 (Jt. Stip. 50, Att. 41).
(g) Extension of authority to remain silent, February 1, 1983 (Jt. Stip. 52, Att. 43).
(h) Application for renewal of license, March 14, 1983 (Jt. Stip. 60, Att. 51).
(i) Extension of authority to remain silent, July 1, 1983 (Jt. Stip. 68, Att. 59).
(j) Form 701 extension of time to construct, August 1, 1983 (Jt. Stip. 70, Att. 61).
(k) Letter request to correct construction permit, August 3, 1983 (Jt. Stip. 71, Att. 62).

The competing application of San Jacinto was filed on July 1, 1983 (Jt. Stip. 67).

33. *Representations with Regard to Shipment of Trailers.* In both the further request to remain silent filed on November 5, 1982 (Jt. Stip. 48, Att. 39) and the Form 701 filed on December 21, 1982 (Jt. Stip. 50, Att. 41), Marr stated:

> Further, the licensee has obtained three trailers for the studio. These trailers are presently located in the Chicago area and will be shipped to Texas when tower construction begins. The studio equipment will then be installed in the trailers.

Forty-two days later, Marr advised the Commission in a further request to remain silent, that:

> Three trailers to house the studio and transmitting equipment *have been shipped from Chicago* and will be assembled at the transmitting site by Turnkey Broadcasters of Louisville, Kentucky when they arrive in the Galveston area. (Emphasis added.).

(Jt. Stip., 52, Att. 43). .

34. Marr considered the use of the three trailers owned by and located at a commonly owned station in Chicago Heights, Illinois, as temporary studio facilities for KXKX. Marr decided not to ship the trailers to Texas City, or use trailers as a studio for KXKX because of the adverse effect upon the Chicago Heights station of moving the trailers, the cost of moving the trailers to Texas City, the potential damages from storms and hurricanes and the necessity to obtain a zoning variance (Marr Ex. 3 at 13-14; Tr. 1030-1031). Benages failed to advise Marr's communications counsel prior to the filing of the further request to remain silent of its decision not to ship the trailers from Chicago Heights to Texas City or not to otherwise use trailers as a studio for KXKX (Marr Ex. 3 at 14; Tr. 1025-1027). Benages admitted that the Commission had been mistakenly informed that the trailers had been shipped, but he claimed the mistake was caused by a "breakdown in communications between Benages and Marr's counsel" who had prepared and filed the further request to remain silent. Benages believed that he had subsequently advised his counsel of the error but he could not recall whether he or someone else on behalf of Marr had ever advised the Commission of the error (Tr. 1025-26; Marr Ex. 3 at 14).

35. *Representations Concerning Availability Of Transmitting Equipment.* Marr in three successive and separate filings with the Commission represented in identical statements that "[a]ll necessary funding for construction is available *as is the bulk of the transmitting/studio equipment"* (emphasis added), namely, in the further request to remain silent filed on November 11, 1982 (Jt. Stip. 48, Att. 39), in the Form 701 filed on December 21, 1982 (Jt. Stip. 50, Att. 41), and in the further request to remain silent filed on February 1 1983/ (Jt. Stip. 52, Att. 43). In direct conflict to that representation, Benages testified that as of January 31, 1983, the only transmitting equipment which Marr had on hand was the old 5 kilowatt transmitter and associated antenna used up until the time KXKX went off the air and located at the KGBC site (Tr. 1019). Benages stated he was not qualified to know whether this transmitting equipment would be used with the Texas City facilities (Tr. 1023). However, by letter of February 2, 1983 (Jt. Stip. 52, Att. 43), the day after Marr had represented to the Commission that the bulk of the transmitting equipment was on hand, Marr's consulting engineer sent Benages a copy of the bid form he had just sent to the vendors for quotations to furnish, among other things, a transmitter, transmission line and an antenna (Jt. Stip. 53, Att. 44). The Marr application (signed by Benages) which was granted for construction permit BMPH-820208AJ specified a Harris 40 kilowatt transmitter to produce the required 100 kilowatt ERP (Jt. Stip, Att. 47) and the transmitter ultimately purchased by Marr from CSI was a 25 kilowatt transmitter to produce the 100 kilowatt ERP (Jt. Stip 92, Att. 82). Marr also used a Shively 10 bay antenna when the facilities were ultimately constructed (Jt. Stip. 89, Att. 79).

36. *Representations Regarding Studio Transmitter Link.* In the further request to remain silent, filed on July 1, 1983, Marr stated that "a new STL [studio transmitter link] has been ordered." (Jt. Stip. 68, Att. 59). The Form 701 filed on August 1, 1983 also reported that an STL had been ordered from Northeast Broadcast Lab, Inc., of South Glens Falls, New York (Jt. Stip. 70, Att. 61).

37. The invitation to bid on the equipment necessary for KXKX, prepared and mailed by Marr's consulting engineer, included the provision of an STL (Jt. Stip., Att. 44; Tr. 13). copy of the invitation to bid was sent by the consulting engineer to Benages. *Id.* By letter of March 8, 1983, the consulting engineer transmitted to Benages, his evaluation of the equipment bids, including the bids to supply an STL (Jt. Stip. 59, Att. 50); Marr Ex. 3 at 14). By letter of April 29, 1983, the consulting engineer sent to Benages a cover letter and purchase order which Benages was to sign and mail with the required downpayment to Northeast Broadcast Lab, Inc. for an STL (Jt. Stip. 64, Att 55).

38. Marr did not order the STL from Northeast Broadcast Lab, Inc. (Marr Ex. 3 at 15; Tr. 1036, 1440, 1445, 1463, 1466, 1632-1633). Benages admitted that he did not use Northeast Broadcast Lab, Inc. as a supplier (Tr. 1048, 1440, 1445). Benages claimed that his failure to correct the statement in the Form 701 that equipment had been ordered from Northeast Broadcast Lab, Inc., was an "oversight" (Tr. 1464). As of October 21, 1983, a date almost three months after the above referenced representations had been made, Marr had not yet made final arrangements for telephone circuits to link the studio and transmitter . or order STL equipment as an alternate (Jt. Stip. 93, Att. 83).

39. *Representations With Regard to Arrival of Equipment at the Site.* In the further request to remain silent filed on July 1, 1983, Marr represented that:

> An order has been placed with Allied Tower Company, Houston, Texas for the new tower. Components for the tower have been assembled and are being prepared for shipment to the- transmitter site.

(Jt. Stip. 68, Att. 59). On August 1, 1983, in the Form 701 it filed, Marr stated "[a]ll orders were placed in April 1983, and the equipment is beginning to arrive on site.- (Jt. Stip. 70, Att. 61). The Form 701 filed on August 1, 1983 was signed by Benages who had reviewed the attached exhibit, which had been prepared by counsel, before signing the application (Tr. 1444-1445, 1464).

40. Benages testified that the only equipment that had arrived on the site, as referred to in the Form 701 filed on August 1, 1983, was the part of the antenna tower section located at the Allied Tower facility in Webster,

Texas (Tr. 1447-1448, 1464). Benages stated that when he referred to the "site" he meant "in and around the general vicinity of the transmitter site" (Tr. 1447). He further testified that by the end of August 1983, no other equipment had been delivered to the site (Tr. 1465). Benages stated that in May 9, 1983, while he was at the Allied facilities in Webster, Texas, about 15 miles from Texas City, an Allied representative took him "to a storage area in the Allied building and showed [him] a section of radio tower which he said was part of the KXKX tower." (Marr Ex. 3 at 15; Tr. 1448). The Allied representative advised Benages that the KXKX tower was being manufactured in Oklahoma and sections were being shipped to Allied's Webster facilities for storage and later assembly (Marr Ex. 3 at 15).

41. Marr presented the testimony of Michael Lancaster, a construction supervisor employed by Allied Tower (Marr Ex. 13) and Roberto Tambolini, an associate of Benages, to corroborate the testimony of Benages that the section of tower located at the Allied facilities in Webster was a section of the tower ordered by Marr for use by KXKX. Lancaster testified only to the facts that he was present, sometime before June 1, 1983, when Benages visited Allied's Webster facilities and that the first sections of the KXKX tower arrived at the Texas City site on approximately October 12, 1983 (Marr Ex. 13).

42. Tambolini's testimony was by declaration, written in English (Marr Ex. 14), and orally in halting English. He does not read English (Tr. 742). Tambolini, in his declaration, stated that in April or May of 1983 he accompanied Benages to the Allied Tower facilities in Webster, Texas, at which time Charles White, an Allied employee, "showed us sections of tower and told us that they were part of the KXKX(FM) radio tower" (Marr Ex. 14). Tambolini stated that the purpose of the visit was to deliver a check for starting the tower work but he did not know whether it was the first or second check, but only something about payment (Tr. 731, 750). Benages did sign some papers during the visit but Tambolini did not know what they were (Tr. 750-751). While Tambolini's declaration and his oral testimony state that White showed Benages and him a part of the KXKX tower (Marr Ex. 15; Tr.737-740), Tambolini, however, admitted that "I don't know what he [White] said specifically." (Tr. 739).

43. Charles White testified that he recalled meeting with Benages and another gentleman identified as the Station Manager of KXKX in the late spring of 1983 at Allied's facilities in Webster, Texas. He further stated that he showed Benages and his companion sections of a tower Allied was building to hold microwave equipment for another client and which had the sane face width as the tower Marr had proposed for KXKX. White had no specific recollection of the exact discussion between him and Banages and his companion relating to the sections of the microwave tower shown them, but "to the best of [White's] recollection, [he] did not advise Michael Benages, or his companion, that the tower sections that [they] viewed on the occasion of the visit were part of the KXKX(FM) tower" (SJBC Ex. 32 at 1).

44. *Representations Concerning Co-Location of Studios with Transmitter.* Marr, in the following documents repeatedly represented to the Commission that KXKX would operate from a combined studio/transmitter facility:

(a) the November 5, 1982 further request to remain silent; Jt. Stip. 48, Att. 39.
(b) the Form 701 filed on December 21, 1982; Jt. Stip. 50, Att. 41.
(c) the February 1, 1983 further request to remain silent; Jt. Stip. 52, Att. 43.
(d) the application for renewal of license filed on March 14, 1983; Jt. Stip. 60, Att. 51 and
(e) the Form 701 filed on August 1, 1983; Jt. Stip. 70, Att. 61.

45. Despite these representations, Marr never took any steps to insure that it would in fact co-locate the main studio at the transmitter location. Thus, except for some general conversations between Benages and Dietel in late 1983/early 1984 about the cost involved for construction of a studio (Tr. 1684, 1687-88) and Benages' August, 1983 discussion with attorney Cain as to the possible use of a trailer (Tr. 1670) Marr took no actions to obtain a studio at the transmitter site after the last quarter of 1982. Benages testified that at the end of the last quarter of 1982 he decided, after he met with the engineer for his Chicago radio station Quenton McDuffie, that Marr would not make use of the Chicago-based trailer (Tr. 1030-31).

46. Furthermore, although aware of the need for a special zoning variance to co-locate the studio/transmitter as early as February 1982 (Tr. 470-2), Marr never requested a zoning variance for locating the studio at the transmitter site (Tr. 1660-61, 1712-13).

47. *Representations with Regard to the Expeditious Construction and Operation of KXKX.* Marr repeatedly represented that time was of the essence and that it would expeditiously construct the improved facilities of KXKX and commence operation. For example, the following representations were made to the Commission:

The March 16, 1982 request to remain silent stated:

> As soon as the application is granted the licensee will expeditiously construct the new facility and commence operation.

Jt. Stip. 22. Att. 13. The May 12, 1982 Form 701 stated:

> The applicant will expeditiously proceed with construction as soon as its presently pending modification application is granted.

Jt. Stip. 31, Att. 22. The June 17, 1982 Form 701 stated:

> Further, a three-month delay in receiving approval of its application seriously threatens the survival of KXKX. The station has already been off the air for almost six months. Even with an immediate grant, several additional months will be required to complete the new facility. An additional three months added to this down time would simply be economically disastrous.

Jt. Stip. 35, Att. 26 at 2-3. The July 13, 1982 further request to remain silent stated:

> As soon as the application is granted, however, the licensee will expeditiously construct the new facility and resume operation.

Jt. Stip. 40, Att. 31. The November 5, 1982 further request to remain silent stated:

> The licensee presently expects that construction will be completed and the station back on the air by February 1, 1983. (That is, three months.)

Jt.-Stip. 48, Att. 39.

The December 21, 1982 Form 701 stated:

> [t]he applicant has been diligently proceeding with its efforts to construct a new studio/transmitter site for Station KXKX. . . .The permittee presently expects that construction will begin and that station will be back on the air during the first quarter of 1983. (That is, within three months.)

Jt. Stip. 50, Att. 41. The February 1, 1983 further request to remain silent states:

> The license expects that construction will be completed and the station on the air within the next 90 days.

Jt. Stip., Att. 43. The application for renewal of license filed on March 14, 1983 stated:

> It is anticipated that Station KXKX will return to the air from its new transmitter/studio location within 90 days.

Jt. Stip. 60, Att. 51. The further request to remain silent filed on July 1, 1983 stated:

> It is anticipated it will take approximately 30 days to complete construction and installation of all equipment. It is the licensee's plan to have the station back on the air during August 1983. (That is within 60 days.)

Jt. Stip. 68, Att. 59.

The Form 701 filed on August 1, 1983, stated:

> Construction is presently scheduled to begin and hopefully end during August 1983.

Jt. Stip. 70, Att. 61.

On August 3, 1983, Marr sought a correction of its construction permit again stating:

> The station is presently under construction and expects to be on the air this month. (This is in less than 30 days.)

Jt. Sip. 71, Att. 62.

48. The above assertions conflict with the actual schedule of construction. The invitations to vendors to bid on the equipment to be used in the construction of KXKX were transmitted by memorandum dated January 31, 1983 (Jt. Stip., Att. 44; Tr. 13). By letter of March 8, 1983, Marr's consulting engineer transmitted his evaluation of the equipment bids to Benages (Jt. Stip. 59, Att. 50; Marr Ex. 3 at 14). As of March 8, 1983, Marr had not contracted with any supplier/manufacturer for any equipment for the construction and operation of KXKX at Texas City (Tr. 1028). The first order placed by Marr was a verbal order on April 5, 1983 to Allied Tower to furnish and install the antenna tower on a foundation to be supplied and constructed by others (Jt. Stip. 62, Att. 53; Marr Ex. 3 at 14). The cover letters and equipment purchase orders for the vendor chosen by Marr were sent to Benages for signature, enclosure of downpayment, and mailing by letter of April 29, 1983 (Jt. Stip. 64, Att. 55). Sometime in May of 1983, Benages orally agreed to have Allied Tower be the general contractor, install the tower foundation, and erect the tower (the order was placed without a price quotation by Allied) (Marr Ex. 3 at 15; Tr. 1050, 1062).

49. Sometime after July 28, 1983, Marr orally placed an order for the construction of the transmitter building (Marr Ex. 3 at 16; Tr. 1449). The necessary Building Permit for the erecting of the tower was issued by Texas City on October 5, 1983 (Jt. Stip. 87, Att. 77; Marr Ex. 3 at 17).

50. The required sketch of the floor layout of the transmitter building was not mailed by Marr's consulting engineer to the building contractor until October 7, 1983, with final plans for construction required to be drawn thereafter by a Texas registered architect or engineer (Jt. Stip. 88, Att. 78; Marr Ex. 3 at 18-19). Construction of the piling foundations for the tower commenced by October 11, 1983, and the foundations were laid by mid-October, 1983 (Jt. Stip. 90, Att. 80; Marr Ex. 13 at 2). Construction of the tower began on approximately October 20, 1983 (Marr Ex. 13 at 2). The contract for construction of the transmitter building was not signed by Marr until October 18, 1983 (Jt. Stip. 91, Att. 81). The contract to purchase the KXKX transmitter from CSI Electronics, Inc. was not signed until October 19, 1983 (Jt. Stip. 92, Att. 82).

51. On October 24, 1983, Benages signed the contract for the purchase of a Shively antenna (Jt. Stip. 97, Att. 87) and by letter of October 25, 1983, Marr's consulting engineer advised Shively of the antenna pattern he had selected for the antenna (Jt. Stip. 99, Att. 89). The hanging of the antenna on the tower was completed on approximately November 9, 1983 (Marr Ex. 13 at 2). The necessary building permit for the transmitter building was issued on November 11, 1983 (Jt. Stip. 105, Att. 95), and construction commenced on that day (Marr Ex. 3 at 19). The transmitter building was completed on November 27, 1983. *Id.* The transmitter was delivered to the site on November 15, 1983 (Jt. Stip. 108, Att. 98; Marr Ex. 3 at 19). As of the third quarter of 1983, Benages had yet to decide precisely where Marr was going to locate the studio (Tr. 1458). Installation of the KXKX studio equipment at the studio at 2501 Palmer Highway commenced in the third of fourth week of November, 1983, and installation was complete in about two weeks (tr. 1724-1725). No provision was made for a studio transmitter link or transmitter studio link until sometime after October 25, 1983 (Tr. 1456-1457). Discussions with the telephone company to alternatively link the facilities by phone line were not conducted until some time in the third quarter of 1983 (Tr. 1457-1458, 1636-1638). Construction of KXKX was not completed until December 2, 1983 (Jt. Stip. 111).

52. As noted above, the Form 701, which was signed on July 28, 1983, represented to the Commission that construction was "scheduled to begin and hopefully end during August, 1983" (Jt. Stip. 70, Att. 61). At no time between the date the Form 701 was signed and September 14, 1983 when the pending application was granted, did

Marr advise the Commission that it had not met its schedule to even begin yet alone complete construction (Tr. 1453).

Issue 3 - Misrepresentations Regarding Zoning Authorization For Studio

53. As early as November 1981 or the first days of December 1981, when Marr began negotiations with Mr. and Mrs Randy Dietel for the purchase of the Dietels' property in Texas City, (which was to become the transmitter site of Station KXKX), Marr's principals were aware of the need for special zoning (SJBC Exs. 7, 19 at 3; Tr. 1097, 1099). In addition, by letter dated December 21, 1981, John Webb of the Board of Adjustments and Zoning Appeals, City of Texas City, advised the real estate agent retained by the Dietels and Marr that the Texas City Zoning Board, at a meeting on December 8, 1981 approved a tower height of 650 feet but -[n]o other improvements or uses of this property can occur without prior consent of the Board of Adjustments and Zoning Appeals" (Jt. Stip. 14, Att. 7).

54. Because the height of the tower approved by the Zoning Board was not adequate (Tr. 470), Marr retained Michael Fieglein, a Galveston attorney who previously represented the former licensee of KXKX and who had represented Marr on certain local matters since the purchase of the station by Marr in May of 1981, to obtain a zoning variance for a 750 foot tower (Tr. 455, 470). Attorney Fieglein was aware, based on his experience, that a zoning variance would also be needed if the KXKX studio were to be permanently located at the Texas City tower site (Tr. 470-71). [16] Accordingly, Fieglein, prior to attending the Zoning Board meeting on February 9, 1982, advised Levine, who at the time was Secretary, a director and 15 percent voting shareholder of Marr, that a variance for the studio would be necessary (Tr. 471). Levine was in Galveston, in his position as an officer, director, stockholder and sometime general counsel to Marr, to assist in obtaining the proper zoning, as well as general overview of the situation (Tr. 471-72, 797- 99, 1663-64, 1726-27; Marr Ex. 3 at 8-9).

55. Attorney Fieglein suggested to Levine, who also is a practicing attorney, that he (Fieglein) informally polled the Zoning Board to determine their attitude (Tr. 471). The result of that informal poll was that the Board members gave an unofficial, non- recorded acquiescence of approval of the necessary variance for location of the studio at the transmitter site (Tr. 470). Levine was present when Fieglein polled the Board and was aware of the results (Tr. 471). Notwithstanding the knowledge that a variance was necessary for the studio to be co-located with the transmitter [17] and the results of Fieglein's informal poll on February 9, 1982 [18] Marr did not retain Fieglein (or anyone else for that matter) to immediately seize the opportunity and obtain the variance. In fact, Marr has *never* requested a zoning variance for use of the studio at the transmitter site (Tr. 1660-63, 1712-13)

56. Notwithstanding these facts, on May 27, 1982, by an amendment signed by Marr's president, Michael Benages, on May 24, 1983, Marr advised the Commission that it intended to move the main studio from Galveston to the transmitter site in Texas CitY (Jt. Stip, 33, Att. 24) Further, in a filing on June 17, 1982, again signed by Benages, Marr requested expedited consideration of its transmitter site change application and again advised the Commission that it intended to co- locate the studio and transmitter at the Texas City site (Jt. Stip. 33, Att. 26). Again, in a report dated July 13, 1982, Marr, as part of a request to remain silent, advised the Commission of its plan to co- locate the studio and transmitter (Jt. Stip. 40, Att. 31). A request to remain silent was filed on November 5, 1982, which again indicated that the studio would be co-located at the transmitter (Jt. Stip. 48, Att. 39). Furthermore, in an application for extension of construction permit (signed by Benages on December 15, 1982), Marr sought additional time to complete construction, again noting the co-location of the studio and transmitter (Jt. Stip. 50, Att. 41). In a letter request dated February 1, 1983, Marr, citing the fact that the studio and transmitter would be co-located, requested extended authority from the FCC to remain silent (Jt. Stip. 52, Att. 43). On March 14, 1983, as part of its application for renewal of license signed by Benages, Marr indicated that it would soon begin operation from its new studio/transmitter location (Jt. Stip. 60, Att. 51). By letter dated July 1, 1983, Marr, again citing the co-location of the studio and transmitter, requested a further extension of time to remain silent (Jt. Stip. 68, Att. 59). In a letter dated August 3, 1983, Marr advised the Commission that the construction permit that was issued specifying Texas City as the new transmitter site failed to indicate that the main studio was also to be co-located with the transmitter and that the permit should be corrected to reflect that fact (Jt. Stip. 71, Att. 62). In each of the foregoing instances, Benages either signed the documents which was filed with the Commission or acknowledged that copies of the same were provided to him by his attorney after filing (Tr. 1032; Jt. Stip. Atts. 24, 26, 41, 51).

57. The clear and unequivocal promise by Marr to the Commission in each of the filings set out in the preceeding paragraph was that Marr intended to co-locate the main studio at the transmitter site and that construction would take place immediately upon grant of the modification application. Notwithstanding these promises, it was not until late summer, 1983 (probably August) before Benages contacted Tom Cain, Texas City zoning attorney, to determine what steps would be necessary for obtaining a variance for the main studio (Tr. 1647; Jt. Stip., Atts. 67, 68). [19] No action was taken at that meeting or requested by Benages (Tr. 1647). Benages met with Cain a second time, in early September, at which time Cain was retained (Tr. 1646, 1651, 1670; Jt. Stip. Att. 67; Marr Ex. 3 at 20). Cain supplied Benages with a copy of the zoning application form and told Benages that he (Cain) should be contacted if Benages had any questions (Tr. 1646, 1651; Marr Ex. 3 at 20; Jt. Stip. Att. 68). Benages never had the zoning application completed nor did he further seek Cain's assistance, even though Cain reminded Benages of the problem in November, 1983 (Tr. 1645-46, 1712-13). At no time was request for a zoning variance to co-locate the studio at the transmitter site even filed by Marr with the Texas City authorities. Despite this fact, as late as July, 1983, in both a request for authority to remain silent [20] and an application for additional time to complete construction, [21] Marr was advising the Commission that it expected to be operating at the Texas City site by the end of August, 1983. [22]

58. In a letter dated November 14, 1983, Marr requested "temporary" authority to locate the KXKX studios at 2501 Palmer Highway in Texas City, alleging to the Commission that, although the City of Texas City had granted the necessary building permit to allow construction of the tower, "it [the City of Texas City] now advises the permit-

tee that a separate building [zoning variance] permit will be necessary for the studio site. *It has refused, however, to issue the necessary permit. The permittee [Marr] is pursuing this matter locally* and hopes to have the permit issued within the next few months." (Jt. Stip. 107, Att. 97 (emphasis added)). [23] In November of 1983, the City of Texas City did not (nor, subsequently, did it ever) deny a zoning variance to co-locate the main studio at the transmitter site (Tr. 1646). Furthermore, in November of 1983, Marr was not pursuing the zoning matter locally, *nor did it pursue a variance after that time. Id.* The errors in this correspondence were never brought to the Commission's attention by Marr (Tr.1713, 1718-19). Based on Marr's representations, the Commission granted the temporary authority requested (Jt. Stip. 112, Att. 101).

59. In a letter dated March 1, 1984, which again showed Benages as receiving a "blind copy," Marr sought an extension of authority to continue operating its main studio from the Palmer Highway address (Jt. Stip. 118, Att. 107). Again, Marr alleged to the Commission that the city of Texas City had *"refused to issue the necessary permit* to locate the studio site at the transmitter site. . . . The station has not obtained the required building permit from the city of Texas City. *It is expected to be issued within the next few months." Id.* (emphasis added). In March of 1984, the Texas City authorities had not refused a variance to Marr to co-locate its main studio at the transmitter site, since no such request had ever been filed (Tr. 1646). Moreover, on March 1, 1984 no zoning application for the required variance was on file with the City of Texas City nor was one under preparation (Tr. 1712-13). At no time did Marr advise the Commission of the errors in its March, 1984 filing (Tr. 1713). Based upon Marr's representations, the Commission granted an extension of the temporary authority Marr sought (Jt. Stip. 119, Att. 108).

60. As noted above, the purpose of the November 14, 1983 and March 1, 1984 correspondence was to seek authority to operate a "temporary" main studio at 2501 Palmer Highway, Texas City. Although Benages testified at the hearing that it is his current intent to move the permanent main studio to the transmitter site (Tr. 1689), Marr, in a pending application (signed by Benages on September 20, 1984), is in fact seeking to "permanently" locate the main studio at the Palmer Highway location (Tr. 1728-29; Jt. Stip. 124, Att. 113). Nowhere in that application, or in the exhibits attached thereto, did Marr advise the Commission of the errors contained in its February, 1983 and March, 1984 requests, even though Marr relied upon the Commisssion's prior actions of granting "temporary" authority for its request to make the Palmer Highway site a "permanent" main studio location (Jt. Stip. 124, Att. 113). At no time did Marr, on its own, ever advise the Commission of the errors in any of these filings (Tr. 1713, 1718).

61. The record is unequivocal that Marr, at the latest, knew on February 9, 1982, [24] that a zoning variance would be necessary if the main studio were to be co-located at the transmitter site (Marr Ex. 3 at 8-9; Tr. 470-72). During his testimony at the hearing, however, Benages claimed that he personally was not informed by either Fieglein, Levine or Blackburn, in February 1982, that such a variance was necessary (Tr. 1720, 1726). Benages' assertion is not credible. At the time in question, Levine was not only an officer, director, stockholder and sometime general counsel to Marr, but he also worked with Benages on other broadcast ventures. Marr Ex. 11 at 1; Tr. 1500, 1521, 1556. [25] Moreover, Benages, Levine and Blackburn were closely coordinating the KXKX operation, and Levine was in Galveston to specifically oversee the operation and attend the zoning meeting (Tr. 471-72, 1663, 1726-27; Marr Ex. 3 at 8-9). It strains credulity that such a major factor--which was emphasized by the extraordinary action of an informal poll of the Zoning Board members in Levine's presence--would not have been reported by Levine to Benages. This is particularly true since the reason Station KXKX was off the air was allegedly because of its loss of a studio site.

62. Benages' testimony on when he first learned of the zoning requirement for the studio is replete with inconsistences. First of all, Benages, when questioned by the Presiding Judge, admitted that he was aware of the necessity for zoning as early as May, 1982 (Tr. 1664-65). However, offering a series of excuses, Benages attempted to explain away why, over the many intervening months, Marr had not applied for zoning approval. (In point of fact, Marr *never* applied for a zoning variance for the studio (Tr. 1664-70, 1672, 1683). Notwithstanding, Benages took the position later on during the hearing that he did not learn of the need for zoning for the studio until late summer of 1983 (Tr. 1720-21). And, at yet another point during his testimony, Benages stated that he knew that zoning for the studio was necessary as far back as 1982 when he "believed" a formal request for such zoning was denied (Tr. 1661-62). [26]

63. Under one of Benages' versions, he (Benages) first learned of the need for zoning in late summer of 1983 from Tom Cain (Tr. 1720-21). Cain, a local Texas City attorney, was recommended to Benages by Randy Dietel because of Cain's expertise in local zoning matters (Tr. 1725-26). Benages failed to explain why it was necessary for him in the summer of 1983 to consult [27] a zoning attorney unless he previously was aware of the need for a variance.

64. Benages also testified that, in his initial meeting with Cain, Benages inquired whether Marr could put trailers at the transmitter site for studio purposes. [28] Cain advised Benages that that would not be possible and that the zoning variance would be necessary (Tr. 1670). A variance for this purpose was not sought (Tr. 1678).

65. Benages also testified that he personally was aware of the need for a variance in May of 1982 (Tr. 1664-65). When asked why he did not seek a variance at that time, Benages said he did not take any action because he was more concerned with the FAA problems (Tr. 1665). After the FAA approval in July, 1982, Benages said he turned his attention to the FAA grant and, therefore, did not seek the variance at that time (Tr. 1665-66). Then, Benages testified that action on the variance was further delayed when he went to the Mayo Clinic [29] from July 21-23, 1982 (Tr. 1666). Benages then testified that as a result of his stay at Mayo he was put on medication (Phenobarbitol) which required two to three months for him to adjust to the effects. *Id.* Benages testified that between November of 1982 until he consulted with Cain in the late summer of 1983, he simply forgot the need for a zoning variance for the studio (Tr. 1666-67). [30]

66. When questioned as to what he did as to constructing its main studio, Benages testified that while he forgot the need for a variance during this time period, he did not forget the need for a studio (Tr. 1669). He recommended the idea of trailers to Cain which would be purchased locally but Cain told him that was not possible with a variance (Tr. 1670). The trailers would have been

of a temporary nature, with a permanent studio to be built in a year or two (Tr. 1674). Although Benages met with Cain again in September 1983 and Cain sent Benages an application for a variance to Benages' office in Chicago in September 1983, nothing was done by Marr or Benages because Benages allegedly forgot all about it (Tr. 1683).

67. Benages talked generally with Randy Dietel in late 1983/early 1984 about the cost involved if Dietel were to construct the studio (Tr. 1684, 1687-88). Benages did not follow up on his conversation with Dietel (Tr. 1688). Benages testified that both the challenge from San Jacinto and money were reasons that he (Benages) did not follow through on a permanent studio building at the transmitter site. *Id.* [31] *Marr has not taken any steps insofar as constructing a permanent studio building at the transmitter site through the close of the record in this proceeding* (Tr. 1689). At no time has Marr or Benages, or anyone acting on their behalf, ever filed a formal request for a zoning variance which would permit the studio to be permanently located at the transmitter site (Tr. 1646, 1660-61, 1712-13).

Issue (4) - Public Inspection File

68. In its renewal application, Marr affirmatively represented to the Commission that KXKX's "Annual List of Issue/Programs covering the period from April 1, 1980 through March 31, 1981 and a partial list covering the period from April 1, 1983 to December 1, 1983 [were] included in the (public inspection) file" (Jt. Stip. 60, Att. 51). On March 28, 1984, San Jacinto principals Ben Walker and Edith Baker reviewed the Station KXKX public inspection file which was located at the law offices of Michael Fieglein in Galveston (SJBC Ex. 6, 13). Fieglein was the custodian of the public inspection file. *Id.* Walker and Baker determined that the file did not contain annual listings of problems and needs for any years. *Id.* According to Fieglein and the secretary/receptionist at his office, the documents reviewed by Walker and Baker constituted the entire public inspection file provided Fieglein for his custody by Marr. *Id.* No evidence was submitted by Marr to refute the testimony of Baker and Walker.

69. Blackburn, former general manager of KXKX, testified that he recalls unidentified documents being placed in the Station KXKX public inspection file during the time prior to the station going silent (Marr Ex. 12 at 4). In December 1981, the file was transferred to the law offices of Michael Fieglein. *Id.* Benages testified that, when the KXKX renewal application was filed, he assumed the public inspection file was complete and contained the issues/programs lists (Marr Ex. 15 at 4). Benages does not now "know why, in March, 1984, San Jacinto's principals were unable to locate those lists in Marr's public inspection file nor [does he] know why those lists currently are not in the file." *Id.* There was no evidence introduced that Benages or anyone else associated with Station KXKX personally reviewed the file to ensure that it was complete nor did anyone from Marr testify as to personal knowledge that the missing documents had ever been placed in the public file.

Issue (6) - Directional Antenna And Excessive Power

70. Issue (6) was specified to determine whether Marr intentionally constructed and operated a directional antenna without prior Commission authorization. Marr's construction permit and license application specify an omni-directional antenna. San Jacinto contended that Marr's antenna highly directionalized toward Houston and away from the Gulf of Mexico. Under Section 73.316(c) of the Rules, a directional antenna is defined as one "that is designed or altered for the purpose of obtaining a non-circular radiation pattern." Section 73.316(d) further requires that an application proposing the use of a directional antenna system set forth a complete technical description of the proposed system and the proposed radiation pattern. San Jacinto also claimed that the effective radiated power (ERP) of Marr's antenna was 168 kW, which would be in excess of the 100 kW maximum ERP allowed by Section 73.211(b)(1) of the Rules (*Memorandum Opinion and Order*, FCC 84M-4919).

71. Station KXKX(FM) was authorized by a construction permit issued July 27, 1982, to operate in an omni-directional mode with a maximum ERP of 100 kW (Jt. Stip., Att. 33). In applying for this construction permit, Marr used the engineering services of Lawrence Behr Associates, Inc. (Behr) (Jt. Stip. Att. 62, pp. 8-11). However, Benages became dissatisfied with Behr and in September 1983, retained the engineering firm of E. Harold Munn, Jr., and Associates, Inc. (Munn) (Marr. Ex. 20, p. 1). On September 14, 1983, Marr received its second extension of time to complete construction under its July 27, 1982, construction permit (Jt. Stip., Atts. 42 and 69). On July 1, 1983, San Jacinto filed its competing application (Jt. Stip., Att. 58).

72. Marr ordered its transmitter equipment prior to retaining Munn, who then reviewed the equipment orders. Munn discovered that a "side-mounted" antenna had been ordered and that it would have a "wide tower face," which he believed would distort, or directionalize, the antenna pattern from the authorized omni-directional mode. Munn suggested two alternatives to solve this problem: (a) mounting the antenna on a pole which would minimize any pattern distortion, or (b) requesting a modification of the construction permit to allow a directional pattern toward Houston. However, it was too late to change the equipment order to a "pole-mounted" antenna and Benages did not want to go through a possibly lengthy process of requesting from the Commission a modification of the construction permit to allow a directional pattern toward Houston. Munn then suggested to Benages that a section of the tower be provided to the antenna manufacturer so that the antenna pattern could be "maximized" or "optimized" to provide the most omni-directional pattern possible, even though utilizing "side-mounting." On the eight possible antenna patterns submitted by the antenna manufacturer, the most omni-directional one was selected. This was labeled "PAR-4." However, this pattern nevertheless provided a stronger signal to Houston and a weaker signal toward the unpopulated Gulf of Mexico (Marr Tx. 19; and Marr Ex. 20).

73. In the opinion of San Jacinto's expert engineering witness, Ronald D. Rackley, a professional engineeer, Marr's antenna pattern was highly directionalized toward Houston. This conclusion was based on the fact that the antenna model selected was unusually capable of being directionalized and the fact that the antenna was "side-mounted" on a seven-foot tower face, which would

greatly exaggerate distortion from an omni-directional mode. Also, parasitic elements, in the form of mounting brackets, were added which would increase the distortion or directionalization (SJBC 24, pp. 306; and Tr. 1160, and 1421-25).

74. Marr filed its application for license on December 19, 1983. Therein, it reported that the measured transmitter power output (TPO) was 22.55, reduced by a rated efficiency of 80.5, or 18.15. Marr also represented that the power gain was 5.5. Thus, according to the calculation method specified by Section 73.310(a)(2) of the Rules, the station's ERP was approximately 100 kW (Jt. Stip., Att. 106). However, based on data given in the same license application, Rackley calculated the actual ERP toward Houston to be approximately 168 kW (SJBC Ex. 24, p. 4). Munn explained that, under the antenna manufacturer's warranty, some variation from the proposed antenna pattern and power can be expected. According to Munn, the variation here was only slightly beyond what could be expected under the warranty and that his best engineering judgment was used in order to comply with Commission Rules (Marr Ex. 19, pp.-45).

Benages' Medical Condition

75. In order to mitigate and explain any inaccurate or misleading statements by Benages to the Commission, Marr submitted evidence of Benages' medical condition. This evidence was also offered in connection with Marr's "renewal expectancy."

76. Since at least 1972, Benages has suffered from persistent headaches and seizures. These seizures cause numbness, tingling, weakness, some difficulty in speaking and walking, and shallow, but rapid breathing. The seizures last about 1 to 3 minutes and sometimes are repetitive. They are known as "Jacksonian" seizures and are caused by lesions or benign tumors in the brain. Benages was advised by his doctors not to have them removed by surgery, but to take drugs to alleviate the symptoms, including the headaches. From March 31, 1981, through July 21, 1982, Benages was taking Inderal for his migraine headaches. The dosage was usually about 40 mg. per day. On July 21, 1982, Benages was admitted to the Mayo Clinic for tests because his seizures had become more frequent and severe. He was advised to take 300 mg. of Dilantin per day and to continue taking 40 mg. of Inderal per day. Benages was dismissed from the Mayo Clinic on July 23, 1982. In October 1982, the dosage of Dilantin was increased to 400 mg. per day, but Benages nevertheless suffered prolonged seizures in November 1982. In August 1983, Benages entered the Evanston Hospital in Evanston, Illinois, because he was experiencing three to five "Jacksonian" seizures per day. By that time, Beanages had been taken off Dilantin because it had given him adverse side effects. He was then prescribed Phenobarbitol to help curb the seizures. He was initially prescribed a dosage of 30 mg. per day. In September 1983, the dosage was increased to 120 mg. per day. At that time, Benages was only having two seizures per day, although they were very severe. In October 1983, he was advised to increase the daily dosage and by November 1984 it had increased up to 380 mg. per day (Marr. Ex. 24, pp. 4-8).

77. According to Benages, he experienced such severe seizures during the latter half of 1981 that he hired Douglas Blackburn to help him run the station. Benages claimed that the Phenobarbital caused him to be drowsy and forgetful (Marr Ex. 3, pp. 21 and 23). Further, Benages claimed that for a 2 to 3 month period following July 1982, he was having problems adjusting to the high levels of Phenobarbital which he was then taking (Tr. 1666). In regard to a specific incident, Benages claimed that the reason he never told the Commission that studio trailers had not been shipped from Chicago to Texas City was the effect of his medication (Tr. 1036). Benages claimed also that the severity and the frequency of his seizures in 1982 distracted him from the task of putting the station back on the air (Marr Ex. 3, p. 23; and Tr. 839). [32]

78. Richard Martin Restak, M.D., an expert witness presented by Marr, examined the medical records of Benages. According to Dr. Restak, both the medication taken by Benages and the brain lesions could cause forgetfulness, confusion, and drowsiness. He defined forgetfulness as a lack of diligence and a failure to follow through, and he defined confusion as not knowing the appropriate thing to do, or the inability to comprehend the full implication of matters. Dr. Restak noted that drowsiness could cause a lack of interest and lack of follow through. In the opinion of Dr. Restak, Benages' medication and illness would not cause him to deliberately tell falsehoods, but could posible cause him not to balance all the factors in a situation and thus give inaccurate information. However, Dr. Restak noted that different persons have different reactions to medication, and that Benages' medical records did not mention any specific adverse side effects (Marr Ex. 24, pp. 8-9; and Tr. 1758-59 and 1770-74).

79. Dr. Restak's testimony was based entirely upon the medical records provided by Dr. Vick and Dr. Restak did not personally contact either Dr. Vick nor any of the other physicians that prepared the documents provided by Dr. Vick (Tr. 1756-58). [33] The only notation in the entire Benagse' medical file discussing sedation [34] was an entry by Dr. Vick on September 22, 1983 indicating "no sedation" resulted from Benages taking Phenobarbitol at the rate of 120 mg. daily (Marr Ex. 24 at A-3). When asked by the Presiding Judge if he thought it unusual that Benages' medical records were silent on the question of drowsiness or forgetfulness. Dr. Restak answered that he would have liked additional details and that some of the physicians apparently were not neurologists (Tr. 1773-74). However, Dr. Vick who has been Benages' doctor since August 1983 is a member of the Division of Neurology, Evanston Hospital, a part of the McGaw Medical Center of Northwestern University and many of the medical documents were reports from the Mayo Clinic, which specifically were prepared by that hospital's neurology department (*See, e.g.*, Marr Ex. 24, at A-18-22). As noted previously, Dr. Vick is the only person to indicate anything about drowsiness or forgetfulness and that entry shows a totally negative effect. *Id.* at A-3. Moreover, it should be noted that the "neurologic record" prepared on Benages at the Mayo Clinic specifically noted that the medical "history from patient *who is an excellent historian"* spells out in detail the effects of Benages' problem; without any reference to drowsiness or forgetfulness. *Id.* at A-20-21 (emphasis added).

80. During the period from May 1981, through December 1983, Benages was actively involved in other broadcast activities. He was a co-owner with his father of JANA Broadcasting Company, Inc., licensee of Station WMPP, Chicago Heights, Illinois. He and his father were equally responsible for running the station from 1981 through 1983. Benages assumed full responsibility after then (Tr. 1491-92 and 1496-97). Benages was a 60% owner of

Jocelyn Broadcasting Company, Inc., license of Station WDGS, New Albany, Indiana, which was acquired in 1981. The assignment application represented that Benages, along with the General Manager, would be responsible for the day-to-day operations. Benages acknowledged that he did, in fact, participate in the day-to-day decision making and that he signed various submissions to the Commission on behalf of the licensee in late 1981 and early 1982 (Tr. 1497-1503). In July 1981, Benages filed an application for construction permit for Liberty City, Florida. This was filed on behalf of RANA Broadcasting Company, Inc., of which he was an 80% owner and Secretary, Treasurer, and Director. There, Benages sought to claim integration credit as a management official. In 1982, Benages signed various submissions to the Commission on behalf of RANA. In May 1983, Benages testified in the Liberty City proceeding (Tr. 1503-11, 1543, and 1548-49). In addition, Benages was an applicant for a UHF television station in West Chicago in late 1981, applied for the RKO General, Inc., FM frequency in Chicago in May 1983, and testified in a Hammond, Indiana, television proceeding in June 1983 (Tr.1554-56 and 1562). At no time did Benages ever inform the Commission of his medical problems, other than a December 1983, submission noting that he had an ulcer. Benages claimed that he wanted to inform the Commission of his medical problems, but that his attorney advised him against it (Tr. 1546-49 and 1563).

Standard Comparative Issue

Marr Broadcasting Company, Inc.

81. Marr, the incumbent licensee of Station KXKX(FM), has three voting stockholders. Michael A. Benages is a director and 50.1 percent voting shareholder of the company, Allan G. Levine is a 39.9 percent voting shareholder and James J. Villaneuva is a 10% percent voting shareholder of Marr. J. Douglas Blackburn is now President/Vice President, Secretary and a director of Marr. See Order, FCC 86M-2044, released June 24, 1986. [35]

82. *Diversification.* Benages was president, a director and 60 percent stockholder of Joselyn Broadcasting Company, the licensee of standard broadcast station WDGS, New Albany, Indiana. *Id.* at 24. Benages is also secretary, a director and 100 percent stockholder (jointly with his father) of JANA Broadcasting Company, Inc., which, as debtor-in-possession, is the licensee of standard broadcast station WMPP, Chicago, Heights, Illinois. *Id.* Allan Levine was secretary, a director and 15 percent stockholder of Joselyn Broadcasting Company. *Id.* at 1. In Marr's August 13, 1984 "Statement Concerning Integration Proposal," Levine and Benages committed to divest their respective interests in Station WDGS and WMPP. *Id.* Blackburn is secretary, director and 73% owner of Blackburn and Blackburn Communications, Inc., licensee of Station WMAD and WMAD(FM), Sun Prairie, Wisconsin. See *Order,* FCC 86M-2209, released July 9, 1986.

83. *Integration.* Marr proposes to integrate Michael Benages into the station's operation as its full-time (minimum 40 hours per week) Executive Director/General Manager (Marr Ex. 3 at 23). Benages would have primary responsibility for implementing programming and sales efforts and for financial management of the station. *Id.* He will also be responsible for ensuring compliance with FCC requirements and training all management level personnel. *Id.*

84. Benages proposes to reside in the Galveston, Texas area. He is Hispanic. *Id.*

Renewal Expectancy

85. Marr assumed control of Station KXKX(FM) on May 16, 1981, and terminated operations on December 3, 1981 (Marr Ex. 1, p. 1). The renewal term in question ran from August 1, 1980, through August 1, 1983 (Section 73.1020(a)(13) of the Commission's Rules: official notice taken). The station resumed operations on December 2, 1983 (Jt. Stip., Item 111, p. 13). [36] From May 16, 1981, through September 28, 1981, the station broadcast 24 hours per day. From September 28, 1981, through December 2, 1981, the station broadcast from 6:00 a.m. until midnight (Marr Ex. 1, p. 1). Prior to Marr's acquisition, the station broadcast 24 hours per day (Tr. 202).

86. Dan McLea was the full-time news director of Station KXKX(FM) until mid-August 1981. He wrote and delivered the station's newscasts, which included actualities and events in the field. After McLea left, Patricia Bellis-Neff, the Station Manger, and Brett Wood, another station employee, did the news. During the May-December 1981 period, local news, including weather and sports comprised almost one-third of the station-produced newscasts. These newscasts ranged from three and one-half to five minutes, not including commercials and public service announcements. The station's broadcast of "UPI World News" was terminated on June 1, 1981. In the period from May 16, 1981, through June 1, 1981, station-produced newscasts were broadcast weekdays on the hour from 7:00 a.m. to 1:00 p.m. and 4:00 p.m. to 6:00 p.m. There were four extra newscasts on the half-hour during morning and afternoon rush hours. From June 1981, until October 15, 1981, the number of newscasts were reduced and the number per weekday was in flux. The number ranged from five to nine per weekday and were mostly broadcast during rush hours. After October 15, 1981, the number of newscasts dropped to two per weekday, which were broadcast during the morning rush hours During the May-December period, there were no station-produced weekend newscasts (Marr Ex. 1, pp. 1-4). The UPI news service was terminated in the summer of 1981. Benages made the decision to terminate this service. No news services were substituted (Tr. 219-20). Each of the newscasts included a full weather report. The weather reports had hurricane or tropical storm reports when necessary. Some of the newscasts devoted attention to local high school sports, recreational boating, and ski reports (Marr Ex. 1, pp. 4-5 and 11-12). The newscasts on sports were discontinued about October 15, 1981 (Tr. 235). In May 1981, news consisted of 4.67 percent of the station's total broadcast time. In June, the percentage dropped to 1.22 percent; in July to 1.49 percent; in August to 1.80 percent, in September to 1.18 percent; in October to 1.29 percent; and in November to 0.60 percent. During the May-November period, weather reports ranged from 0.40 percent to 0.49 percent of total broadcast time (Marr Ex. 6, p. 6). The weather reports were usually of 20 second duration and were broadcast almost every hour the station was on the air (Marr Ex. 6, p. 4).

87. Station KXKX(FM) broadcast two public affairs programs. One was "Magazine" which was broadcast weekly through August 23, 1981, on Sunday mornings from 7:30 to 9:00 a.m. This program was station-produced and featured interviews and topics of local interest. The other program was "Longhorn Radio Network" which

was syndicated and consisted mostly of interviews. This program was about a half-hour long and was broadcast each weekday morning around 5 a.m. It was terminated by Marr at the end of May 1981, even though it was still available for broadcast (Marr Ex. 1, pp. 6-8; and Tr. 239). "The Arnold Moreno Show" was broadcast from August 30, 1981, through December 2, 1981. This program was in Spanish, featured Latin music, and was logged as an entertainment program, but did include some news and topical information. The program was broadcast on Sunday mornings from 7:30 to 9:00 a.m. (Marr Ex. 1, p. 10; and Tr. 243). In May 1981, public affairs programs constituted 2.36 percent of total broadcast time. In June, July and August, the percentages ranged from 0.80 percent to 0.87 percent. In the months thereafter Station KXKX(FM) broadcast no public affairs programs (Marr Ex. 6, p. 6).

88. Station KXKX(FM) broadcast four religious programs. None were locally produced. "Master Control" was a 30-minute program produced by the Southern Baptist Radio-Television Commission. It was broadcast weekly on Sunday mornings at 5:30 a.m., generally during the May-December 1981 period. "The Lutheran Hour" was a 30-minute syndicated program which was broadcast weekly on Sunday mornings from May 17, 1981, through October 4, 1981, and mostly at 6:00 a.m. "Music and the Spoken Word" was a 30-minute program syndicated by the Mormon Church which was broadcast weekly on Sunday mornings, usually at 5:30 a.m., and generally during the May-December 1981, period. "Powerline" was a 30-minute program syndicated by the Southern Baptist Radio-Television Commission which was broadcast weekly on Sunday mornings at 7:00 a.m., generally during the May-December 1981, period (Marr Ex. 1, pp. 8-10; and Tr. 242-43). In the months from May through November 1981, religious programs constituted from 1.04 percent to 1.56 percent of total broadcast time (Marr Ex. 6., p. 6).

89. From May 17, 1981, through November 30, 1981, Station KXKX(FM) broadcast 4,437 public service announcements for various local organizations (Marr Ex. 3). Included was the "KXKX Job Connection," which was started in October 1981, in co-operation with the Texas Employment Commission to help make public various job openings for the unemployed (Marr Ex. 1, p. 11). During the week of May 17-22, 1981, the station aired 31 to 41 public service announcements daily (Tr. 293-93). During the week of October 25-31, 1981, the station aired 15 to 20 public service announcements daily. Almost half of these public service announcements were "Job Connection" (Tr. 294-95). During the month of November 1981, the station aired a total of 585 public service announcements, which would average about 19 to 20 per day (Tr. 788).

90. In the month of May 1981, the station's total non-entertainment programming constituted 9.08 percent of total braodcast time. In the month of June 1981, this percentage dropped to 3.55 percent. In the month of November 1981, the percentage was 2.59 percent (Marr Ex. 6., p. 6). [37]

91. In its application for assignment of license, which was executed on September 19 1980 by Benages, Marr made various proposals concerning the programming at Station KXKX(FM). Therein, Marr proposed to operate 128 hours per week. Included in this proposal were 5 hours, 7 minutes of news, or 4 percent of total broadcast time; 1 hour, 17 minutes of public affairs, or 1 percent of total broadcast time; and 1 hour, 17 minutes of all other non-entertainment programming, or 1 percent of total broadcast time. All of this programming was proposed to be in Spanish (SJBC Ex. 1, pp. 2 and 3). Marr specifically proposed to broadcast "The Mexican-American Experience," a 90-minute public affairs program, each Sunday at 9:00 a.m. (SJBC Ex. 1, p. 8). The application noted that the then current licensee had two full-time news persons on its staff who gathered local and regional news through telephone and personal contacts, police band radio receiver, local media personnel, police and civil defense personnel, and general referrals. Local and regional news then accounted for 40 to 60 percent of the news programming. National news then came from UPI and AP news services. However, the assignment application made no explicit representation to continue the news operation of the assignor (SJBC Ex. 1, p. 7). Benages never talked to Patricia Bellis-Neff, the Station Manager, about Marr's programming proposals in the assignment application, nor was she given any instructions regarding such proposals (Tr. 206 and 208). Benages never talked to Douglas Blackburn, the General Manager, about these program proposals (Tr. 1089-91).

92. Marr presented five public witnesses in its behalf. Joseph Elmer Huff, III, was director of public relations for the Port of Galveston during 1981. He testified that Station KXKX(FM) aired public service announcements concerning the International Port of Galveston Festival in October 1981. Huff noted that the station regularly aired public service announcements for the port authority, but they were aired as part of a package deal, if the port authority bought ads (Tr. 300-2 and 309). Lowell Gene Bindhammer was sales manager for Telepromoter Cable TV in Galveston during 1981. He was responsible for buying media ads for the company and promoting civic activities. Bindhammer testified that Station KXKX(FM) was receptive to promoting civic activities and looking for things to do. One area that he noted was the station's involvement in "Toys for Tots" in late 1981 (Tr. 315, 318, and 326). Deborah J. Garcia was with the Galveston Chamber of Commerce in the latter half of 1981. She was responsible for news releases and public service announcements. Ms. Garcia noted that the station never turned down anything that she sent them (Tr. 333-35). Susan Haire was director of public media for the Galveston County Cultual Arts Council during the latter half of 1981. She was responsible for putting out news releases, ads, and promotional materials. Ms. Haire testified that Station KXKX(FM) aired the Art Council's public service announcements at desirable times and not during the "graveyard" period, but she noted that the other Galveston area stations also ran the Arts Council's public service announcements at desirable times (Tr. 346, 350-51 and 355). Frank Carmona was a Galveston County Commissioner during 1981. He was interviewed on the "Al Moreno Show" in the fall of 1981. This was a live interview in Spanish and was about voting rights. He received "feedback" on this from the community (Tr. 602-04).

San Jacinto Broadcasting Corporation

93. San Jacinto is a corporation organized under the laws of the State of Texas (SJBC Ex. 2 at 2). Its current officers, directors and stockholders, and their respective stock interests as of the "B" cut-off date in this proceeding, are as follows:

Ownership

Name and address	Office	Director	as of "B" cut-off date
Ben W. Walker 16243 Katherin Lane Channelview, Texas 77520	President	Yes	48.5%
Edith L. Baker 5337 Sugar Hill Drive Houston, Texas 77056	Secretary/ Treasurer	Yes	48.5%

Id.; Tr. 397-99.

94. The genesis of the San Jacinto application was as follows. During a trip to Galveston in July of 1982, approximately a year prior to the filing of the San Jacinto application, Ben Walker discovered that Station KXKX was off the air (Tr. 447, 451-52). On a subsequent visit to Galveston, he noticed that the station was still off the air (Tr. 447). Walker checked around to see if the station was undergoing some kind of difficulty and was told by an employee of one of the other Galveston stations that Station KXKX had been off the air for some time. *Id.* Walker, proceeding in his investigation of the matter, made numerous telephone calls to the offices of the Commission in Washington, D.C. to try to ascertain the circumstances surrounding the station's continuing silence. *Id.* Walker began to assemble all possible information relating to KXKX, obtaining copies of Commission documents concerning the stations's status (Tr. 448).

95. After ascertaining the length of Station KXKX's silence and determining that the station was apparently going to remain off the air for some indefinite period, Walker began to assemble an organization to file an application to challenge Station KXKX's renewal application (Tr. 447). In connection with the contemplated application. Walker secured Washingon legal and engineering counsel and was involved in reviewing possible transmitter sites (Tr. 448, 659-60). He filed a request for airspace clearance for a proposed tower site (Tr. 448). Walker's efforts in putting the San Jacinto application together extended for a period of roughly a year from the time he discovered the station was off the air until the application was filed (Tr. 452). Walker estimates (conservatively, in his view) that he devoted, in the aggregate, not less than one month's effort of regular employment in connection with the project (Tr. 452-53).

96. At the time the San Jacinto application was filed, San Jacinto's owners were Walker (47.5 percent), Karen Alexander (47.5 percent), and Edward Saconas (5 percent) (Tr. 397). On the "B" cut-off date, the San Jacinto application was amended to reflect that Edith L. Baker had become a principal in San Jacinto with a 48.5 percent ownership interest (Tr. 397, 613-14). Walker also then had 48.5 percent and Alexander had 3 percent of San Jacinto's stock (Tr. 397). The consideration for Walker's stock was, *inter alia,* his work in investigating the utilization of the channel and filing the San Jacinto application, as well as his time and the effort expended by him in the initial stages of prosecution of the application (Tr. 406). Walker has also agreed to pay for one-half of the costs of construction and operation over $100,000 (Marr Ex. 5 at 2; Tr. 408-09; 417-18).

97. Baker's participation in the application came as the result of her learning in July of 1983, through a notice in *Broadcasting* magazine, that San Jacinto had applied for Station KXKX's facilities (Tr. 622-23). After determining that the deadline for filing a competing application had already passed. Baker looked up Walker in the Houston telephone directory and called him to inquire about his participation in the San Jacinto application. *Id.* During that conversation, Walker stated that he was seeking someone to join the application (Tr. 622-23). Walker and Baker met to discuss Baker's participation. It was agreed that Baker would purchase stock in San Jacinto (Tr. 624). In exchange for her stock, Baker agreed, *inter alia,* to pay all expenses related to the prosecution of San Jacinto's application, to provide the first $100,000 of the cost of construction of the station, and to pay for one-half of the costs of construction and operation over $100,000 (Marr Ex. 5 at 2; Tr. 654, 658). As stated above, Walker will provide the other half of funds expended over $100,000 (Marr Ex. 5 at 2; Tr. 408-09, 417-18). Baker has also agreed to procure the necessary financing for the construction and operation of the station, with the understanding that she, and not the lender, will look to Walker for payment of his one-half of the costs of construction and operation over $100,000 (Tr. 643-40). Baker and Walker have agreed that, in the event a settlement of this proceeding were reached between the parties that resulted in the payment of monetary consideration to San Jacinto, Baker and Walker shall be entitled to a sum equal to the amounts each has expended in connection with the prosecution of the application and the balance shall be divided equally between them (Marr Ex. 5 at 4).

98. *Diversification.* Neither San Jacinto nor Ben Walker have interests in any medium of mass communications (SJBC Ex. at 2: SJBC Ex. 3at 4-5). Edith Baker has no broadcast interests (SJBC Ex. 12 at 7). She is the owner of Action Outdoor Sign Company, a small billboard company in Houston which has three billboards with four billboard faces. *Id.*[38]

99. *Integration.* San Jacinto proposes 97 percent quantitative owner-management integration. Walker intends to be integrated into the station's operations and will be employed at the station a minimum of 40 hours per week as its full-time Operations Director and Chief Engineer (SJBC Ex. 3 at 2). He will also be a member of the station's management committee, initially to be comprised of Baker and Walker, which will meet weekly in order to discuss and make decisions relating to station policy, programming, and personnel matters. *Id.* As Operations Director, Walker will supervise much of the day-to-day operation of the station and will help implement the station's overall policy objectives. *Id.* He will also be involved in training personel at the station, and will serve as a coordinator on scheduling personnel, including programming employees. Id. Walker will consult and work closely with the station's General Manager on overall policy and day-to-day operations. *Id.* In his capacity as Chief Engineer, Walker will supervise any necessary construction or equipment installation. *Id.* at 3. He will also make decisions on the purchase of major pieces of technical equipment and will be responsible for ensuring the station's compliance with the Commission's technical regulations. *Id.* If additional technical personnel are required, he will be primarily responsible for hiring, training and supervising such personnel. *Id.*

100. Walker was born in 1933 in Fort Worth, Texas. *Id.* at 2. From 1980 to the present, he resided within San Jacinto's proposed 1 mV/m contour and will remain in that residence upon grant of the San Jacinto application.

Id. As set forth below, Walker has significant broadcast experience, having worked as a broadcast engineer, in supervisory as well as staff positions, since 1952.

101. Walker began his career at KCUL, Fort Worth, Texas, where he was employed as a staff engineer from May 1952 through November 1953. *Id.* at 3. From 1955 through 1957, he was an announcer and the chief engineer at KMRC, Morgan City, Louisiana. Between July of 1959 and July 1980, he was a staff announcer and chief engineer at KLEA, Lovington, New Mexico. *Id.*

102. In 1960, he took a position at KXKW in Lafayette, Louisiana, and was responsible for the construction of that station. *Id.* He was chief engineer of KXKW, supervising 4 engineers and transmitter operators, from August of 1960 to August of 1964. Id; Tr. 389. Next, Walker was employed at KCTA, Andalusia, Alabama, from August, 1964 through June, 1965 as its chief engineer, announcer (SJBC Ex 3 at 4). Between June, 1965 and December, 1967, he worked as director of engineering for Dixie Radio, Inc. and KCIL, Inc. *Id.* While employed by those two related corporations, Walker constructed WDLP(FM), Panama City, Florida, WYNR AM/FM, Brunswick, Georgia, and KCIL-FM, Houma, Louisiana. *Id.* With respect to the construction of the aforementioned stations, Walker testified that in most cases he was solely responsible for the construction of the stations, having had practically no help (Tr. 386, 389).

103. Walker was next employed by the federal government, working as an engineer at the Voice of America Bethany Relay Station in Mason, Ohio, from 1968 through March, 1973 (SJBC Ex. 3 at 4). In 1973, Walker took a position as chief engineer at KENR in Houston, Texas and worked there through 1977. *Id.* After leaving KENR, Walker rejoined the Voice of America and worked as an engineer at the Edward R. Murrow Transmitter Station in Greenville, North Carolina from July of 1977 through August of 1980. *Id.* Since 1980, he has worked as an engineer at KTRH in Houston, Texas. *Id.*

104. Edith L. Baker proposes to be integrated into San Jacinto's proposed station's operations as its full-time General Manager, working at least 40 hours per week in that position (SJBC Ex. 12 at 2). In her capacity as General Manager, Baker will have overall responsibility for the operation of the station. *Id.* She will oversee the hiring of department heads and other key personnel at the station and will be ultimately responsible for all financial matters, including oversight of the station's budget, investment and credit policy. *Id.* at 2-3. Baker will be in charge of the station's sale of advertising time. Id at 3. The administrative and promotional components of the station's operation will also be under her supervision. *Id.* In addition, she will be responsible for the implementation of the station's equal employment opportunity program with respect to the recruitment, evaluation, selection, promotion, compensation, training and termination of employees. *Id.* Baker will also be a member of the station's management committee, which will meet weekly in order to discuss and make decisions relating to overall station policy, programming, and personnel matters. *Id.*

105. Baker is a female, and was born on March 2, 1925 in Sioux City, Iowa. *Id.* at 2. She lives in Houston, Texas, within San Jacinto's proposed 1 mV/m contour. *Id.* She has resided at that address, or elsewhere within San Jacinto's proposed 1 mV/m contour, since 1949. *Id.* Upon the grant of a construction permit to San Jacinto, Baker will establish a second residence in or near Galveston in order to avoid commuting daily from her residence, which is approximately 50 miles from Galveston. *Id.* Baker anticipates that she would utilize the Galveston residence on the average of two to three nights a week. *Id.* As detailed below, throughout the period of her residence within the proposed station's service area, Baker has been active in a wide variety of civic organizations and activities involving young people and the betterment of the community. *Id.* at 3.

106. Professionally, Baker has been active in the Houston Chapter of American Women in Radio and Television (AWRT) from 1962 to the present. *Id.* AWRT is a trade, social and charitable organization dedicated to the advancement of opportutnity for women in broadcasting. *Id.* Over the years, she has served on many of the chapter's committees and has been active in numerous fundraising drives. *Id.* Recent committee assignments include co-chair (1983) of "Soaring Spirits," [39] the Family Fest '84 Committee (a cooperative effort with a local television station to promote local family and child help organizations), and the 1984 Media 10 Committee (an awards program for local broadcasters). *Id.* at 3-4. She has participated in fundraising for AWRT scholarships, internships and "Soaring Spirits." *Id.* at 4.

107. While her children were growing up, Baker was also active with the Boy Scouts of America and the Girl Scouts of America. She was involved with the Boy Scouts between 1959 and 1964 and again between 1967 and 1972. *Id.* She served as a Cub Scout den mother during those periods. *Id.* Between 1968 and 1978, she was a Brownie leader, a Girl Scout troop leader, and assistant day camp director, day camp treasurer and neighborhood chairman for the Girl Scouts. *Id.* Baker was a member of the Rogers Junior High School Band Parents Club from 1971 through 1977 while some of her children were in junior high school. *Id.* She helped transport students and band instruments to band concerts and also assisted in fundraising. *Id.*

108. Baker has been a member of St. Martin's Episcopal Church in Houston since 1964, serving as assistant librarian to the church from 1964 to 1982. *Id.* Baker has also been an active member of the Morning Organic Garden and Health Club (the first garden club in Houston to promote organic gardening) since 1957. *Id.* at 5. The club has been active in providing information concerning organic gardening to the general public and other garden clubs. *Id.* She has served as corresponding secretary (1961-62) and president (1963-64, 1964-65) of that organization. *Id.* From 1965 to the present, she has been a member of the Tanglewood Garden Club. *Id.* The Tanglewood Garden Club supplies funds to landscape esplanades and parks in Houston and it provides Christmas decorations for Holly Hall for the Elderly. *Id.* She has been active on various committees within this club, most recently including chairperson for the progressive brunch from 1984-85. *Id.*

109. In addition, Baker has been a member of the Houston Opera Guild since 1980. Id at 4-5. Since 1982, she has also been a member of the Houston Heritage Society, an organization dedicated to identifying and preserving old homes, buildings, artifacts, crafts and art in Houston's history. Id at 5. She has been a member of the Women's Institute in Houston since 1979 and has attended classes provided by the Institute in subjects such as history, art, literature, music, life sciences and religion. *Id.*

110. Baker also has experience in running a radio station. *Id.* From November of 1960 through April of 1966, she was the general manager of KRBE(FM) in Houston, Texas. *Id.* At that station, she was responsible for the entire operation of the station, including supervising the announcers and the engineers. *Id.* She was in charge of sales at KRBE(FM) and was also responsible for the station's programming. *Id.* at 5-6. Baker published a program guide for the station, which was a classical music station, for five years. *Id.* at 6.

111. *Auxiliary Power.* San Jacinto proposes to install and operate an auxiliary power generator at its transmitter site to be used in the event of any emergency condition causing an interruption in normal electrical power supply (SJBC Ex. 4 at 2). With the use of its emergency power supply, the station will remain on the air to broadcast emergency informatioon and news. *Id.*

CONCLUSIONS

Issue (1) - Misrepresentations In Request To Ramain Silent

112. Issue (1) was specified to determine whether Marr misrepresented to the Commission its reasons for initially going silent and later whether it made misrepresentations in subsequent requests for extension of time to remain silent. The findings demonstrate, and it is concluded, that Marr made misrepresentations to the Commission, and lacked candor, in its December 9, 1981, request to remain silent. This request stated that its reasons for discontinuance of its operations were termination of the lease on its studio at the Flagship Pier and the need to find suitable studio facilities at a new location. Although Marr did, in fact, lose its studio lease, the findings establish that the actual reason for going silent was Marr's desire to shut down an unprofitable and limited coverage radio station until a new taller tower with greatly expanded coverage could be built. Loss of the studio lease was a fortuitous coincidence. This conclusion is amply demonstrated by General Manager Douglas Blackburn's testimony that he recommended that the station go silent because of financial problems and the need to maximize coverage; majority owner Michael Benages' testimony that decreasing revenues were a primary reason to go silent; Station Manager Patricia Bellis-Neff's testimony that Blackburn told her the reason for shutting down operations was primarily budgetary or financial and did not mention loss of the studio lease to her; minority owner Levine's letter to Stuart Law, dated January 4, 1982, wherein he stated that going silent was predicated upon moving the underutilized station to a new tower location with new power and transmission facilities (Jt. Stip., Att. 8), and Michael Fieglein's letter, dated January 28, 1982, to the SBA wherein he stated that the station was shut down because it was not a justifiable expense to build an interim studio to use for only a few months when new permanent facilities were planned.

113. In the December 9, 1981 letter, Marr also requested an STA to remain silent while it attempted "to locate suitable substitute facilities". Marr misrepresented the facts to the Commission. The evidence demonstrates that this was never done and that Marr, when it represented otherwise to the Commission, never had any intention of selecting a replacement studio site. Marr and its principals had made the business decision to close down the station for the duration of the period during which improved transmitting facilities were to be constructed. Indeed, if Marr had wanted to continue operations, it surely could have found suitable studio space in Galveston. The testimony of William Cherry, a commercial real estate broker and an expert on commercial real estate market conditions in Galveston, established that commercial space for lease or purchase was abundant in Galveston during the period in question. In fact, Cherry's representative listing of other properties showed available rental property during the period in question for as little as 50 cents to 95 cents per square foot.

114. Moreover, the testimony of Andy Anderson, general manager of Station KGBC(AM) in Galveston established that Marr had available to it a site for the studios of KXKX that would have been tailor-made for continuing the operation of KXKX uninterrupted, at least as an interim alternative until Marr was able to find space of its own. Station KXKX could have been moved right into Station KGBC (where KXKX's transmitter and antenna were located and where, in fact, the KXKX studios were previously located). As was shown in the findings, Marr's *post hoc* complaints about the alleged inadequacies of KGBC are completely ineffectual. The evidence shows that there was, in reality no fire problem, no space problem, no technical problem, and no flooding problem. The bottom line is contained in Benages'testimony. He did not follow up on Anderson's offer of studio and office space at KGBC because, for reasons known only to himself, *Benages did not choose to move the station there.* As discussed, *supra*, the evidence demonstrates that Marr's decision to take the station off the air was purely a business judgment and was not due to any lack of available space for Station KXKX's studio in Galveston.

115. Thus, it is clear that, initially, the underlying motive behind Marr's seeking Commission authorization to remain silent was to reduce costs during the construction period. Marr obviously believed that it would be much more acceptable to the Commission if it were to claim a temporary loss of studio space, than to acknowledge from the outset that the station was being taken off the air and would not be returned until after the improved facilities were built at the Dietel site.

116. Moreover, once the Commission had authorized the station's remaining silent, Marr's efforts during 1982 were not directed toward construction of the station. Rather, throughout 1982, its motivation for KXKX's remaining silent and its efforts were aimed at selling the station's bare license and the construction permit, which authorized the construction of a "Houston" facility. In fact, immediately after the proposed transmitting site had been purchased and had received zoning approval for the construction of a tall tower, Benages authorized Jay Blackburn to contact broadcast brokers to offer the station for sale at a price of $3.5 million. It should be noted that Marr had acquired the station six months previously for $750,000, including a covenant not to compete (Jt. Stip. 2). In an April 1, 1982 stock purchase agreement in which Benages bought out two stockholders, Benages unequivocally represented that it was his intention to attempt to sell the corporation "to any ready, willing and able buyer." The stock was purchased with promissory notes payable in cash in 1984.

117. Through the spring and early summery of 1982, Marr negotiated for the sale of the station to Quantum Communications, Inc. Despite Benages' attempt at the hearing to deny his involvement in attempts to sell the station, his direct personal invovlement in the atempted

sale included the extension of a counteroffer in response to an offer presented to him on behalf of Quantum. As set forth in the findings, Banages' counteroffer was a very detailed proposal for the sale of the radio station. At the conclusion of the counteroffer, Benages expressed his view that the terms he had outlined in the counteroffer letter provided a sufficient basis upon which a formal sale/purchase contract could be drafted. In connection with this proposed sale, Marr's attorney and Quantum's attorney then engaged in the process of drafting and exchanging a loan agreement, a construction contract, and a voting trust agreement as well as an Escrow Agreement and a Guaranty for payment of a promissory note. Further confirming extrinsic evidence of Marr's intention to sell the station is the July 21, 1984 letter of Cynthia Carner to Walter Threadgill wherein she states Marr's intention to sell the station at a net of $3 million and that Marr was "waiting for a signed contract". Also reflective of Marr's intent to sell the station is the filing of its Employer's Quarterly Federal Tax Return as a "final" return.

118. Although the Quantum deal was never consummated, Marr continued to receive offers and explore a potential sale of the station well into the fall of 1982. In a letter dated November 2, 1982, broker Normal Fischer advised Benages that he would continue to "comb the woods" for other potential purchasers. Marr's efforts to sell the station continued into early 1983. Only in early 1983, when the time for filing its renewal of license application for the station (filed March 14, 1983) drew near, did Marr take even the first tentative steps toward construction of the new tower and the reinstitution of operations. Clearly, Marr's actions and attitude with respect to the return of the station to the air can in no conceivable way be regarded as diligent.

119. From the foregoing, it is clear that Marr willfully and knowingly misrepresented the facts and was seriously lacking in candor in filings with the Commission regarding its taking Station KXKX off the air and remaining silent for the balance of the license period. Marr's initial motive for remaining silent was to reduce costs while its improved facilities were constructed. Later, as Marr's principals began to solicit and entertain offers for the sale of the station, Marr obviously believed that it was under no compulsion to return the station to the air if it were successful in locating a buyer who would purchase the bare license and construction permit for the improved facility at a price satisfactory to Marr.

Issue (2) - Misrepresentations As To Status Of Construction

120. On July 10, 1980, Marr contracted to purchase Station KXKX and shortly thereafter studied ways to improve the facilities by increasing power and moving to a tall tower. The assignment of license of KXKX to Marr was approved by the Commission and then consummated on May 16, 1981. As set forth in detail under Issue 1, Marr turned the station silent on December 3, 1981. The construction permit for the improved facilities at the Texas City site was granted on July 27, 1982.

121. Around that time, Benages authorized his General Manager to contact broadcast station brokers to offer the station, which was off the air, but held the right to improve the facilities of the station by moving it to a tall tower and increasing power, for sale for $3.5 million. During that same period, Benages, in an agreement by which he bought out the minority stock interest of his partners for a promissory note payable two years later, unequivocally represented that it was his intention to attempt to sell the corporation to any ready, willing and able buyer. The efforts to sell the station by Marr and its broker are detailed in paragraph 22 to 27 of the findings of fact. The potential economic gain from selling the license and bare construction permit for the non-operating station provided ample motive for Marr's failure to construct and for the misrepresentations with regard to construction filed with the Commission.

122. Only the filing of the KXKX renewal of license and San Jacinto's competing application terminated Marr's interest in selling the station and motivated it to construct the facilities authorized by the Commission. As detailed below, the misrepresentations with regard to the status of construction of KXKX were numerous and significant.

123. *Misrepresentations With Regard to Shipment of Trailers.* On November 5, 1982 and on December 2, 1982, in a further request to remain silent and in a Form 701, respectively, Marr advised the Commission that it intended to move trailers owned by and located at another radio station owned by Benages to the proposed KXKX transmitter site to be used as the studio. Forty-two days later, on January 1, 1983, Marr advised in a further request to remain silent that the trailers had been shipped from Benages' Chicago radio station and that they would be assembled at the transmitter site by a contractor for use as the KXKX studio. Benages admitted that the trailers were never shipped and that the Commission had been mistakenly informed that they had, but he claimed the mistake was caused by a "breakdown in communications between Benages and Marr's counsel" who had prepared and filed the further request to remain silent.

124. This explanation does not withstand scrutiny and does not excuse the misrepresentation. As the placement of the trailers at the transmitting site would have demonstrated significant progress toward returning the station to the air, it is reasonable to conclude that the Commission relied upon the representation in granting the further request to remain silent.

125. During the hearing, Benages testified that he decided not to use the trailers because of the adverse effect upon the Chicago station of moving the trailers, the cost of moving the trailers, the potential damage from storms and hurricanes *and* because of the necessity to obtain a zoning variance for use of the trailers. It must be concluded that this is a *post hoc* attempted explanation of Marr's failure to ship the trailers, as the evidence of record demonstrates that Benages did not learn of the need for a zoning variance for the trailers from a zoning lawyer until some seven months after he advised the Commission the trailers had been shipped. Moreover, allegedly the discussion with the zoning attorney dealt with trailers to be purchased locally, not the Chicago-based trailers. Furthermore, Benages could not recall whether he or anyone else on behalf of Marr ever advised the Commission of the error and no written advice to the Commission of the error was submitted by Marr. It must, therefore, be concluded that Marr intentionally misrepresented a material fact in the further request to remain silent filed on February 1, 1983.

126. *False Representations Concerning Availability of Transmitting Equipment.* Marr, in three successive and separate filings with the Commission, represented in identical statements that "[a]ll necessary funding for construction is available *as is the bulk of the transmitting*/studio

equipment" (emphasis added.) Were the assertions true, they would demonstrate that little more was required to construct the station and return KXKX to the air. It is clear, however, that in each instance where this representation was made, (on November 15, 1982, December 21, 1982 and February 1, 1983), the only transmitting equipment that Marr had on hand was the old KXKX transmitter and antenna located at Station KGBC and that Marr had no intention of using that equipment to construct the high powered station authorized by the outstanding construction permit. Marr knew that no usable transmitting equipment was on hand which it intended to use, as, at the time it was representing to the Commission that the equipment was on hand, it was soliciting bids from vendors for a transmitter, transmission line and an antenna. The facility, as actually constructed, used equipment ordered and purchased subsequent to the representation to the Commission that the bulk of the transmitting equipment was on hand.

128. *Misrepresentations Regarding Studio-Transmitter Link (STL):* On July 1, 1983, in a further request for additional time within which to complete the construction of KXKX, Marr advised the Commission that, among other things, it had ordered an STL. One month later, in a Form 701, Marr again advised the Commission that the STL had been ordered. The record clearly shows that Marr never ordered an STL from Northeast, nor had it ordered an STL from any vendor prior to its representations to the Commission that it had. Furthermore, as Marr had only just completed the process of ordering equipment, it must have known what it had ordered and what it had not ordered.

129. Benages' explanation that the misrepresentation was an oversight does not mitigate the seriousness of the false statement. The repetition of the error in two separate filings with the Commission demonstrates a cavalier attitude toward the processes of the Commission and a disregard for the absolute necessity that accurate information be filed with the Commission for its reliance thereon. It must be concluded that Marr intentionally misrepresented to the Commission in its further request to remain silent filed on July 1, 1983 and in its Form 701 filed on August 1, 1983, that it had ordered an STL.

130. *Misrepresentations with Regard to Arrival of Equipment at the Site.* In its further request to remain silent, filed on July 1, 1983, Marr advised the Commission that an order had been placed for the antenna with Allied Tower and that components for the tower have been assembled and are being prepared for shipment. One month later, in its further request for additional time to construct the station, Marr represented to the Commission that "equipment is beginning to arrive on site." Marr admitted at hearing that the only equipment to have arrived on the site by the date the representation had been made to the Commission was a section of antenna tower which Benages claims to have seen at the Allied facilities in Webster, Texas, some 15 miles from the transmitter site.

131. The evidence of record demonstrates that Benages visited the Allied facilities in Webster in April or May of 1983, that he was accompanied by his assistant, Roberto Tambolini, that he met with Charles White, an employee of Allied, and that White showed Benages and Tambolini a section of antenna tower having the same width as the tower purchased by Marr. Benages claimed he was advised by White that the tower section was a section of the KXKX tower. However, White has testified he did not so advise Benages. The testimony of White who has no financial interest in this proceeding, is credible and will be credited.

132. Moreover, since as the only equipment Marr cited to support its August 1, 1983 representation that "equipment is beginning to arrive on site," was the alleged section of tower located some 15 miles from the transmitter site, it is concluded that, in fact, no equpment had been delivered to the site as of the date the representation was made. A statement in a Form 701 concerning the delivery of equipment to a construction site is a material representation of progress in the construction of a facility. The misrepresentation of that fact further demonstrates Marr's lack of fitness to be a Commission licensee.

133. *False Representations Concerning Co-Location of Studios with Transmitter.* On five different occasions between November 5, 1982 and August 1, 1983, Marr represented to the Commission that KXKX would operate from a combined studio/transmitter facility. However, Marr took no concrete actions to obtain a studio at the transmitter site after the second quarter of 1982 and, although aware of the need to co-locate the studio/transmitter as early as February 1, 1982, Marr never requested a zoning variance for location of the studio at the transmitter site.

134. *Misrepresentations with Regard to the "Expeditious Construction" and Operation of KXKX.* On four separate occasions before the construction permit to relocate KXKX at Texas City was granted on July 17, 1982, Marr represented to the Commission that, as soon as the application was granted, it would expeditiously construct the new facility and commence operation. Marr even urged in July 17, 1982, that a three month delay in receiving approval of its application for a construction permit "seriously threatens the survival of KXKX..." and "would simply be economically disastrous." However, at the same time, it commenced the active sale of the silent station and the construction permit for the improved facility.

135. In six filings after the construction permit was granted and up until the beginning of August, 1983, Marr represented that construction was imminent and that it would be completed in a short time and certainly before the end of August, 1983. An analysis of the actual schedule of the ordering and delivery of equipment, the construction of the transmitter building and leasing of studio space,and the erection and installation of equipment, shows that Marr knew or should have known that its representations were false or that they lacked candor. At no time did Marr advise the Commission of reasons for the delays in construction or that the representations in its pending requests were no longer accurate. It must be concluded that Marr's early intentions were to delay construction and the associated costs in order to sell a bare license and construction permit and that Marr finally began construction of the station only when San Jacinto filed its competing application.

Issue (3) - Misrepresentations Regarding Zoning Authorization For Studio

136. The graveman of this issue rests with the question whether Marr made misrepresentations or demonstrated lack of candor in its requests to the Commission for temporary authority to locate its main studio at the Palmer Highway address. In seeking this "temporary" authority, Marr made specific representations to the Commission relating to the necessary zoning required by

the City of Texas City before Marr could co-locate its main studio at the transmitter location. The record is clear and unrefuted that these representations were totally and knowingly false.

137. In its November 14, 1983 initial request for use of the Palmer Highway studio location, Marr advised the Commission that the City had just advised Marr of the need for the zoning variance; that the City had refused to grant the variance; and that Marr was pursuing the matter locally and hoped to have the variance within a few months. Each of these specific representations was knowingly false. In November of 1983, the City of Texas City did not, nor did it ever, deny a zoning variance to co-locate the main studio at the transmitter site. Furthermore, in November 1983, Marr was not pursuing the zoning matter locally nor did it ever pursue a variance after that date. Moreover, it was not in November of 1983 that Marr became aware of the need for this variance since Marr was made aware of the need for a zoning variance as far back as February, 1982, when Marr was advised by attorney Fieglein of this requirement. In fact, Fieglein, in the presence of Marr principal Levine informally polled the Texas City Zoning Board to determine if such a variance would be possible.[40]

138. Benages initially claimed not to have been told by either Fieglein or Levine about the need for the variance in February 1982. Benages' claim is not credible in viw of the relationship of Benages and Levine. Benages later conceded that he was aware of the need for the variance by May of 1982. Subsequently, Benages testified that he first learned of the need for the variance from attorney Cain in August 1983. Not only is this contrary to his earlier specific testimony as to why he (Benages) had failed to obtain the zoning variance at an earlier date (see findings 65) but also, even if it were to be accepted, the representation made to the Commission in its November 14, 1983 request for temporary authority that the City of Texas City "now advises" Marr that the variance will be necessary would continue to be knowingly false.

139. Marr compounded its November 24, 1983 falsehoods with the March 1, 1984 request to extend the temporary authority to use the Palmer Highway studio location. Again, Marr told the Commission that the City of Texas City had refused to grant the variance to locate the studio at the transmitter site but that the variance was expected to be issued within the next few months. Again, these representations were knowingly false. In March, 1984, the City of Texas had not denied a request for a zoning variance by Marr to co-locate the studio/transmitter since Marr had never made such a request. Also on March 1, 1984 no zoning application was on file with the City of Texas City, nor was one under preparation.

140. Finally, in an application signed by Benages on September 22, 1984, Marr sought to convert the Palmer Highway studio location to a permanent status. Nowhere in that application did Marr correct the previous errors even though Marr relied upon the Commission's prior actions of granting "temporary authority" for its request to make the Palmer Highway site a permanent studio location.

141. Marr's demonstrated misrepresentations and lack of candor, so clearly intended to deceive the Commission, cannot be countenanced. It is axiomatic that the Commission demands candor from those who come before it. Its entire regulatory scheme "is premised on [its] ability to rely on the accuracy and truthfulness of [its] licensees' representations." *See Island Broadcasting Corporation of South Carolina*, 60 FCC 2d 146, 157 (1976); *see FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *Country Broadcasting Co.*, 93 FCC 2d 83 (Rev. Bd. 1983). *See also RKO General, Inc. v. FCC*, 670 F.2d at 232 (D. C. Cir. 1981); *Leflore Broadcasting, Inc., v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980); *Grenco, Inc.*, 39 FCC 2d 732, 737 (1973); *Nick J. Chaconas*, 28 FCC 2d 231, 233 (1971); *The Prattville Broadcasting Co.*, 4 FCC 2d 555, *recon. denied*, 5 FCC 2d 601 (1966). In view of the repeated and pervasive pattern of misrepresentations and lack of candor by Marr and its principals regarding the circumstances of its going silent and remaining off the air, the status of construction, and the relocation of its studio, the disqualification and denial of Marr's application for renewal of license is mandated.

142. Marr's contention that Benages' medical condition excuses or mitigates any misrepresentation or lack of candor must be rejected. During all of 1981 to 1983, Benages was actively involved in numerous other broadcast endeavors with no apparent impairment of his abilities. In any event, Benages was totally aware of his medical condition at that time, yet failed to inform the Commission of any potential disabilities. Further, because Benages then knew of his medical problems, he should have taken appropriate precautions to insure the accuracy of his submissions to the Commission. Also, Benages was never acting alone. He always had other business associates, management-level employees, and legal counsel. Marr's explanation for Benages' misconduct is not a legitimate excuse, only a self-serving, *post hoc*, rationalization. Indeed, the initial misleading December 9, 1981, request to remain silent was not prepared by Benages, but rather Allen Levine, a co-owner, and Douglas Blackburn, the General Manager, were responsible for its submission. No claim of medical disability for Levine and Blackburn was put forth by Marr.

143. Moreover, nothing in Benages' medical records indicates any specific adverse side effects which would cause him to be untruthful or less than candid. Further, although Dr. Richard Restak, an expert medical witness, testified that Benages' condition could cause forgetfulness, confusion, and lack of follow through, there was no medical evidence that Benages was, in fact, affected in this way. It is noteworthy that Benages' misleading statements form a definite pattern of obscuring or failing to disclose matters of significance. If Benages had truly been forgetful and confused, there would have been additional gratuitous misstatements of fact in his submissions. Accordingly, Benages' medical condition is not a credible excuse for the pervasive pattern of misrepresentation and lack of candor exhibited by Marr regarding matters of decisional significance.

Issue (4) - Public File

144. Issue (4) was specified to determine whether Marr violated Section 73.3526 of the Rules, and, if so, the circumstances thereof. Marr had failed to include a copy of the listing of issues/programs for the period April 1, 1980, through March 31, 1981, and April 1, 1981 through December 1, 1981. The findings demonstrate, and it is concluded, that Marr violated Section 73.3526 of the Rules by not including issues/programs lists for the aforementioned periods in its public file. Marr's explanation, that Benages gave the public file to Marr's local counsel and that Benages assumed it was complete, demonstrates an abdication of licensee responsibility. But more impor-

tantly, although Marr specifically represented in its renewal application, filed March 14, 1983, that the issues/programs lists for the periods in question were included in the public file, Marr's principals admitted they had no actual knowledge of their inclusion. In sum, Marr and Benages knew such lists were required to be in the public file, never bothered to verify their inclusion, yet specifically assured the Commission that the requirements of Section 73.3526 were met. The Commission cannot condone licensees representing compliance with certain rules where, in fact, the licensee has no reasonable basis for making such representations.

145. Marr's misconduct forms another basis for disqualifying and denying the renewal application of Marr. Again, Marr has demonstrated that it cannot be trusted as a Commision licensee. Renewal applications now require little information from licensees. Therefore, what few questions that are asked have greater significance. *See United Broadcasting Co.*, 58 FCC 2d 1346 (Rev. Bd. 1976), where it was held that a licensee cannot delegate its responsibility to a custodian to maintain its public file; and *American International Development, Inc.*, 75 FCC 2d 109 (Rev. Bd. 1979), *modified on other grounds*, 86 FCC 2d 808 (1981), *recon. denied*, 50 RR 2d 370 (1981), where a licensee was disqualified for submitting an application containing statements which the licensee had no knowledge whether they were true. Finally, for the reasons noted in paragraphs 142 and 143, *supra*, Benages' medical condition cannot be accepted to mitigate Marr's misconduct.

Issue (6) - Directional Antenna and Excessive Power

146. Issue (6) was specified to determine whether Marr intentinally constructed and operated a directional antenna without prior Commission authorization, and whether Marr had operated with excessive ERP. The findings established, and it is concluded, that Marr operated with a directional antenna toward Houston and that it operated with excessive ERP toward Houston. In July 1982, Marr was granted a modification of its construction permit which authorized an omni-directional pattern at 100 kW ERP. In September 1983, after obtaining two extensions of time to complete construction under this permit, Marr retained the services of a new engineer. San Jacinto's competing application had been filed on July 1, 1983, and Marr was then (September) in the process of seriously commencing construction. The new engineer discovered that a "side-mounted" antenna had been ordered which would be mounted on a wide tower face, and which he believed would cause significant distortion or directionalization from the authorized omni-directional mode. The engineer suggested to Benages two alternatives to solve this problem. One alternative was to mount the antenna on a pole which would minimize directionalization. The other alternative was to request from the Commission modification of the construction permit to allow a directional pattern. However, it was too late to change the equipment order to have a "pole-mounted" antenna, and Benages did not want to go through a possibly lengthy process of requesting another modification of the construction permit. The engineer then suggested to Benages that a section of the tower be provided to the antenna manufacturer so that the antenna pattern could be "maximized" or "optimized" to provide the most omni-directional pattern possible, even though utilizing "side-mounting" of the antenna. Although the most omni-directional pattern possible was chosen, this pattern nevertheless provided a stronger signal to Houston (168 kW, rather than the authorized 100 kW) and a weaker signal toward the Gulf of Mexico. The antenna, which was specifically manufactured to be highly directionalized, was "side-mounted" on a seven-foot wide tower face and parasitic elements, in the form of mounting brackets, were added. As a result, directionalization was exaggerated.

147. It is therefore concluded that the station's antenna pattern was intentionally directionalized. Most importantly, this conclusion is based on the fact that Marr was faced with the dilemna of re-ordering an omni-directional antenna, or requesting a modification of Marr's construction permit. As of September 1983, any further delay in resuming operations would have jeoparized Marr's license renewal. On July 1, 1983, San Jacinto had filed its competing application and Marr had then been off the air for almost two years. Thus, Marr simply chose to circumvent Commission rules, rather than remain off the air any longer. Section 73.316(d) of the Rules requires that a specific request be made to the Commission in order to utilize a directional antenna. Marr failed to do this. It is significant that Galveston is located between heavily populated Houston and the unpopulated Gulf of Mexico, which almost mandates the use of a directional antenna in order to serve Houston. But for whatever reason, Marr had previously requested and had been authorized only an omni-directinal antenna at an authorized power of only 100 kW. Accordingly, Marr and Benages have again demonstrated that they cannot be trusted as Commission licensees. This intentional violation of the rules constitutes a continuing pattern of deceit and evasion which would further support denial of renewal.

Issue (7) - Comparative Issue

Renewal Expectancy

148. In the event Marr is deemed to be basically qualified despite its misconduct, the comparative analysis would in this case begin with an evaluation of Marr's record of operating Station KXKX during the preceding license term. The justification for considering the licensee's past performance is that that performance has very significant value as an indicator of how that same broadcaster is likely to perform in the future. *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1208 (D.C. Cir. 1971). *See also Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 55 (D.C. Cir. 1978). When a licensee demonstrates in a renewal proceeding that it has in fact rendered meritorious service to the public, the Commission acknowledges such service by the award of a comparative preference--a preference which can carry such decisional weight that it has been denominated a "renewal expectancy" preference. Renewal expectancy, however, is not necessarily dispositive. It is but one factor to be weighed with the other structural comparative factors. *Central Florida Enterprises, Inc. v. FCC (Central Floria II)*, 683 F.2d 503, 506 (D.C. Cir. 1982); cert. denied, 460 U.S. 1084 (1983).

149. Thus, in a very real sense, a licensee "runs on its record." *Broadcast Renewal Applicants*, 66 FCC 2d 419, 429-30 (1977), *aff'd sub nom., National Black Media Coalition v. FCC*, 589 F.2d 578 (D.C. Cir. 1978). When that record is in conflict with the public interest, however, a

heavy burden rests on the renewal applicant to show that renewal of its license would be in the public interest. *See Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966). While an incumbent licensee which had performed in a superior manner during the license term would be eligible for a strong and probably dispositive comparative preference, an incumbent which has not provided even minimally adequate service is entitled to no preference whatsoever.[41]

150. In the instant case, it can only be concluded that Marr most certainly failed to provide minimally acceptable service to Galveston during its tenure as licensee of Station KXKX during the 1980-83 renewal period. In fact, Marr's total abandonment of its community of license is without precedent in reported FCC decisions of comparative renewal proceedings. Marr provided absolutely *no service whatsoever for 20 of the 26 months* that it held the license during this term. Moreover, as established in the findings, Station KXKX's silence was not caused by circumstances beyond Marr's control; rather, the station was dark as the result of a deliberate business judgment on the part of Marr's owners to take the station off the air. The owners initially intended to return to the air only after improved facilities for the station, which would make it a more profitable station, were constructed. Later, instead of engaging in a diligent effort to return to the air, Marr's owners decided to solicit and entertain offers to purchase the silent facility with its bare license and construction permit to make it a more powerful operation.

151. The seriousness of Marr's failure to broadcast cannot be understated. As the Commission itself has stated, the "prolonged suspension of station operation disserves the public interest...." *Application for Renewal of License*, 37 RR 2d 1, 10 (1976); *Cf. Federal Broadcasting System, Inc.*, 38 RR 2d 692, 698 (1976) ("... to permit ... any ... licensee to maintain a silent station for an extended and indefinite length of time would frustrate the efficient utilization of available radio frequencies which the Commision is mandated by law to ensure"); *United Television Co., Inc.*, 46 FCC 2d 698, 700 (1974) ("any prolonged period of silence is inconsistent with the public interest").

152. Moreover, as demonstrated above, KXKX's silence was initially authorized by the Commission in reliance upon false representations and lack of candor on the part of Marr concerning the circumstances surrounding the station's being taken off the air. In addition, even though Marr later told the Commission that it intended that Station KXKX would remain off the air until its new facility was built, the Commission's authorization of the station's silence does not constitute a justification for being off the air which would salvage for Marr a "renewal expectancy." There was no "act of God" or other cause beyond Marr's control to excuse the failure to broadcast. Indeed, as stated in the findings, Marr could have gone back on the air at any time from a replacement studio in Galveston (either at KGBC or elsewhere) using KXKX's transmitter and antenna at KGBC, which remained in place. While Marr attributed its going off the air to "decreasing revenues" and "economic problems," financial difficulties do not excuse a licensee from fulfilling its obligations to operate in the public interest. [42]

153. Furthermore, Marr's service during the short period it actually operated Station KXKX (May 1981 through December 1981) was insufficient to warrant a "renewal expectancy." First, Marr submitted absolutely no evidence that it had even attempted to ascertain what issues were important to the community of Galveston so that the station could broadcast programs in response to those concerns. The evidence demonstrates that Marr's issues/programs lists for the pertinent periods were not in its public inspection file and Marr produced no evidence that such lists were ever compiled. In view of this complete failure of proof in the area of ascertainment, Marr cannot connect what little public affairs programming it broadcast to any ascertained problem or need, which is a fundamental prerequisite for the extention of credit for such programming. *See, Broadcast Renewal Applicant*, 66 FCC 2d at 428.

154. Additionally, as set forth in the findings, Marr failed to produce any evidence relating to the nonentertainment programming of other stations in the market even though such information had been requested by the Presiding Judge. Without such information, the Presiding Judge has no way of determining how Marr's performance compares with the performance of the other Galveston stations. Marr has failed to meet its burden of proof on this aspect of renewal expectancy and, in the absence of any evidence, it cannot be presumed that Marr's performance was superior to that of any other station.

155. Moreover, almost from the day that Marr assumed control, non-entertainment and public service programming was reduced or eliminated. By the end of May 1981, the "Longhorn Radio Network" program was discontinued, even though still available for broadcast. "UPI World News" was discontinued in June 1981. No other news service was substituted. After June 1, 1981, the number of station newscasts was substantially reduced. In May, 1981, news consisted of 4.6% of the station's total broadcast time. In June, the percentage dropped to 1.22% and remained at that level until November, when it dropped to 0.60%. The station's full time news director left in August 1981, and his position was never filled. The station's only public affairs program, "Magazine," was discontinued at the end of August 1981. No public affairs program was substituted. In May 1981, public affairs programs constituted 2.36% of total broadcast time. In June, July, and August, the percentages ranged from 0.80 to 0.87%.

156. During the first week of operation under Marr, the station broadcast about 31 to 41 public service announcements per day. By October and November 1981, only about 20 public service announcements were broadcast per day. The percentage in May 1981 for the overall non-entertainment programming was 9.08%. In June 1981, the percentage dropped to 3.55%, and by November it dropped further to 1.59%. In contrast, in Marr's transfer application to assume control of Station KXKX(FM), it had promised a total of 6% non-entertainment programming. Accordingly, because Station KXKX(FM)'s non-entertainment and public service programming significantly and continuously declined under Marr's stewardship, any "renewal expectancy" is negated. *Cf. Simon Geller*, 90 FCC 2d 250 (1982), *rev'd on other grounds sub nom. Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984).

Diversification

157. Marr has no other broadcast interests and its principals, Levine and Banages, who had interests in broadcast properties as of the "B" cut off date, have either divested or committed to divest those interests. In addition, in light of Blackburn's lack of an ownership interest

in Marr and the considerable distance between Sun Prairie, Wisconsin and Galveston, the impact of those interests upon the diversification criterion is *de minimis*. Accordingly, the factor of diversification of control of the media is not brought into play with respect to Marr. Similarly, this factor is not of decisional significance with respect to San Jacinto's application. Neither San Jacinto nor Ben Walker have any media interests. Although Edith Baker is the owner of Action Outdoor Sign Company, a small billboard company in Houston which has three billboards with four billboard faces, no significance is attached to that interest. The potential for media concentration arising from this truly *de minimis* interest is too remote to have any impact here. *Cf. Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1962 (Rev. Bd. 1978); *see also Policy Statement on Comparative Broadcast Hearings)* 1 FCC 2d 393, 395 (1965).

Integration

158. Marr is, at best, [43] entitled to 50.1% quantitative full time integration for Benages' proposal to be the station's general manager. San Jacinto is entitled to 97% full time quantitative integration credit for its proposal to integrate Walker and Baker into the station's day-to-day operations in full time managerial positions. This 46.9% quantitative integration disparity constitutes a clear and decisive integration advantage and warrants a moderate integration preference for San Jacinto. *See The New Continental Broadcasting Company*, 88 FCC 2d 830, 850 (Rev. Bd. 1981) (12.5% quantitative difference warrants slight integration preference). Any qualitative advantage that may arguably accrue to Marr cannot overcome the quantitative integration superiority of San Jacinto. *See Van Buren Community Service*, 87 FCC 2d 1018 (Rev. Bd. 1981). [44]

Auxiliary Power

159. San Jacinto is entitled to a slight preference for its proposal to have an emergency power generator for the station. *See Gilbert Group, Inc.*, 88 FCC 2d 401 (Rev. Bd. 1981).

Final Comparative Evaluation

160. Even assuming Marr was not disqualified, San Jacinto would be the comparative winner. Neither applicant receives a diversification demerit. However, San Jacinto's integration proposal is superior to that of Marr's. Also, San Jacinto receives a slight preference for its auxiliary power proposal.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of San Jacinto Broadcasting Corporation for a construction permit IS GRANTED; and the application of Marr Broadcasting Company for renewal of license of Station KXKX(FM) IS DENIED. [45]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge
Federal Communications Commission

FOOTNOTES

[1] The issues have been renumbered so that the basic qualifying issues are addressed first.

[2] These issues were added by the Presiding Judge. See *Order*, FCC 86M-4950, released November 28, 1984.

[3] See footnote 2.

[4] The issues were added by the Presiding Judge. See *Order*, FCC 84M-4919, released November 23, 1984.

[5] The comparative issue included a comparison of the areas and populations to be served. No party, however, sought to claim a comparative preference for superior coverage.

[6] Station KGBC(AM) is owned by Harbor Broadcasting which is not affiliated with Marr (Marr Ex. 3, p. 2).

[7] As discussed under the comparative issue, Benages now hold 50.1% stock and is no longer president.

[8] This building is also known as the T. Jeff League Building (SJBC Ex. 10, p. 5).

[9] SJBC refers to San Jacinto exhibits.

[10] Blackburn is now president and a director of Marr.

[11] Andrew Johnson, an SJBC expert witness who testified on this line-of-sight matter, conceded that the ships, most of which were about 125 feet above the water would block a line-of-sight from the Strand building to both of the Station KXKX(FM) transmitter site (Tr. 1219-42). Oscar Molina, the Harbormaster of the Port of Galveston acknowledged that many of the 800 ships which use the port each year have a height of 125 feet above the water. In addition, floating oil rigs, which are 300-400 feet above the water, are sometimes in the port area (Marr Ex. 25, which was stipulated to by San Jacinto at Tr. 1818).

[12] Levine formerly held a 15% interest. He now owns 39.9% of Marr's stock.

[13] In his review, Cherry used 1000 square feet as a guideline because that figure was comparable to the amount of square footage he was informed by Neff to be adequate for studio and office space for KXKX (SJBC Ex. 10 at 3).

[14] Anderson also was of the view, like Cherry, that there was no shortage of studio space in Galveston. He said thousands of square feet was available (Tr. 508-511).

[15] The Marr construction permit application was not amended to reflect that the studio would be co-located with the transmitter until May 27, 1982 (Jt. Stip., Att. 24).

[16] Fieglein also testified that he was told on or about the time that KXKX was taken off the air on December 2, 1981 (and certainly prior to December 5, 1981) that Marr had decided to permanently co-locate the studio and transmitter at Texas City (Tr. 463-65).

[17] At the February 9, 1982 meeting, the Zoning Board also officially approved the 750 foot tower height variance, which action was memorialized in a letter to Marr's real estate agent, with copies to Attorney Fieglein and Blackburn at Marr's Chicago address. This letter again emphasized that:

> The Board approved this request for a radio tower not to exceed 750 feet in height to be operated by Radio Station KXKX. It was mentioned at the Public Hearing the broadcast facilities for the radio station may be relocated to the above mentioned site. As I stated at the meeting, no other uses besides those granted by the Board can occur at this site. Before any broadcasting facilities or business activities can be erected at this site, the property

must be rezoned from District "A" (First Dwelling) to District "E" (General Business). No assurances can be given this process will occur (Jt. Stip. I, Att. 10).

[18] By this time, KXKX had been silent over 2 months allegedly because of a lack of studio site.

[19] Benages met with Cain at the urging of Dietel, who advised Benages that Cain was an experienced and knowledgeable zoning attorney (Tr. 1726).

[20] Filed July 1, 1983 (Jt. Stip. Att. 59).

[21] Signed by Benages on July 28, 1983 (Jt. Stip., Att. 61).

[22] Cain advised Benages that it would take at least 3-6 months before zoning approval could be achieved (Tr. 1644).

[23] This letter which was prepared by Marr's Washington attorney was based on information provided by Benages (Tr. 1716-17). Benages was shown as receiving a "blind copy" of this letter (Jt. Stip. Att. 97) and acknowledged having received a copy (Tr. 1718).

[24] It is also obvious that Marr was aware prior to that date, either in late November or early December 1981 that a zoning variance would be necessary at the Dietel site and conditioned its earnest money agreement with the Dietels on their obtaining "appropriate zoning approval for a radio station tower transmitter *and studio building.*" (SJBC Ex. 19 at 3 (emphasis added)). This agreement was signed by Benages on behalf of Marr (*Id.* at 2).

[25] For example, Levine prepared and reviewed documents relating to the assignment of the WDGS license and attended the closing (Tr. 1500, 1521).

[26] This, of course, is contradictory to Benages' own testimony that a formal request for a zoning variance for the studio was *never* submitted to the Texas City authorities (Tr. 1645-46, 166-61, 1712-14), which again, of course, is contrary to the representations made by Marr in various filings with the Commission.

[27] Despite the advice from Cain in late summer 1983, it was not until September 1983 that Benages formally retained Cain. Even then, Benages failed to follow through on the zoning variance application.

[28] These were trailers that would be purchased locally and not the trailers located in Chicago which were earlier considered (Tr. 1643).

[29] See paragraphs, *infra*, for discussion of Marr's evidence relating to Benages medical situation.

[30] Benages also testified that it was not until November 1983, when the request for a temporary studio at Palmer Highway was filed that communications counsel was first advised of the zoning variance (Tr. 1713). This would appear to be at odds with Benages' testimony that he "remembered" to file for a temporary studio in November 1983 when communications counsel "reminded" Benages that he had done nothing to operate the studio at the transmitter site (Tr. 1668). A "reminder" by communications counsel in November 1983 could only relate to the zoning variance from a legal aspect.

[31] The San Jacinto application to operate on the frequency occupied by Station KXKX was filed on July 1, 1983 (Jt. Stip., Att. 58).

[32] Benages does not "claim that I have been bedridden for the last four-and-a half years." Between the attacks and other than their occurrence, Benages was reported by Dr. Nicholas Vick as "enjoy[ing] excellent health (Marr Ex. 2 at A-2). Dr. Vick is a member of the Division of Neurology, the Evanston Hospital, which is associated with the McGaw Medical Center of Northwestern University (Marr Ex. 24, p. A-2). Benages consulted Dr. Vick in August 1983, and has been examined by him each year since that time (Marr Ex. 3, p. 22).

[33] Dr. Restak testified that he believed that Benages was currently getting treatment from Benages' brother and father who are also physicians. However, he does not know if either has prepared any reports and he (Restak) has never spoken to either (Tr. 1757).

[34] Dr. Restak testified that sedation and drowsiness are essentially the same concept (Tr. 1775).

[35] By amendment filed August 1, 1986, Marr advised that the Commission has granted Marr's application for involuntary assignment of license and construction permit of Station KQQK (formerly KXKX) from Marr Broadcasting Company to Marr Broadcasting Company, Inc., Debtor-in-Possession. See *Order*, FCC 86M-2739, released September 5, 1986.

[36] The facts and circumstances of Station KXKS(FM) going silent and remaining off the air for the remainder of the renewal term are put forth under Issues (1) and will not be repeated here.

[37] Marr failed to produce any evidence relating to the non-entertainment programming of other stations in the area. Marr was on notice that such data was traditionally tendered by licensees seeking a "renewal expectancy" (Tr. 225).

[38] Her ownership of these three billboards and four billboard faces out of a total of approximately 3500 billboard structures and 500 billboard faces in Houston is equivalent to .086 and .08 percent of the billboard structures and faces, respectively. The source for the number of billboards and faces were Dick Smith, Head of Sign Administration, Department of Public Works, Houston, Texas (SJBC Ex. 12 at 7).

[39] "Soaring Spirits" provides alternatives to regular daytime television programming for children in various hospitals and institutions in the Houston area through the donation of video cassettes, videotapes players, and television sets.

[40] In fact, the Earnest Money Agrement with the Dietels, which was signed by Benages on behalf of Marr and which is dated December 2, 1981, was conditioned upon the Dietels obtaining "appropriate zoning approval for a radio station tower transmitter *and studio building.*" SJBC Ex. 19 (emphasis added).

[41] *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1012 (1981); *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC (Central Florida II)*, 683 F.2d 503 (D.C. Cir. 1982).

[42] Marr notes that it greatly improved the station's facilities and expanded the station's coverage area. However, Marr fails to note that the construction of these new and improved facilities actually commenced in earnest only after the filing of a competing application and after the end of the license term. In addition, Marr presented no evidence that its expanded coverage brought new service to any underserved population. Absent this evidence, it must be presumed that the persons newly served by Marr already were well-served with five or more services.

[43] On July 3, 1986, San Jacinto filed "Comments," on the comparative effect of Marr's May 13, 1986 amendment. San Jacinto states in its "Comments" that Benages has given a Power of Attorney to Levine giving him full authority for directing the affairs of Marr. However, it is unnecessary to reach the question of the effect of this action and/or Benages medical condition on his integration proposal in light of San Jacinto's quantitative integration superiority.

[44] Thus, the recently enunciated position of the Commission expressed in its brief in *James V. Steele v. FCC*, No. 84-1176 (D.C. Cir.) (rehearing en banc) is of no consequence. Even if the qualitative enhancements were considered, San Jacinto's proposal would still be preferred. Even though Benages is a member of a minority group, both Baker and Walker are long-time residents within the proposed station's service area. The enhancement based on service area residence of San Jacinto's 97% owners is at least equivalent to Marr's 50.1% integrated principals's minority status. See *Radio Jonesboro*, 57

RR 2d 1564, 1567 (1985). In addition, besides credit as a female, Baker has substantial community and civic involvement which further enhances her integration proposal. San Jacinto's integration proposal is still enhanced further by the extensive broadcast experience of Edith Baker as an operator of a radio station and by the long-time broadcast experience of Ben Walker in technical and many other facets of broadcast station operation.

[45] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-22

In the Matter of

	RM-5151
Amendment of Section 73.202(b),	RM-5322
Table of Allotments,	
FM Broadcast Stations.	
(Pocatalico and Dunbar,[1]	
West Virginia)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 24, 1986 Released: November 19 , 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making* 50 Fed. Reg. 4521, published February 5, 1986, proposing the allotment of FM Channel 233A to Pocatalico, West Virginia, as that community's first FM service, at the request of Mountaineer Communications Corporation ("Mountaineer"). West Virginia Rural Radio Company ("WV Rural") filed a petition seeking the allotment of Channel 233A to Dunbar, West Virginia, as that community's first FM service.[2] Mountaineer filed supporting comments reaffirming its intention to apply for the channel. WV Rural filed further comments[3] suggesting Channel 254A as an alternate channel for Pocatalico and Mountaineer responded in support thereof.

2. The channels can be allotted consistent with the Commission's minimum distance separation requirements of Section 73.207 with site restrictions. Our engineering study reveals that Channel 254A can be allotted to Pocatalico, West Virginia with a site restriction of 3.1 kilometers (1.9 miles) northeast of the city to avoid a short spacing to Station WSIP-FM, Channel 255Cl, Paintsville, Kentucky.[4] Channel 233A can be allotted to Dunbar, West Virginia with a site restriction of 2.7 kilometers (1.7 miles) north of the city to avoid short spacings to Station WOAY-FM, Channel 231 and a new allotment for Channel 234A at Mount Gay, West Virginia.

3. We believe the public interest would be served by the allotment of Channel 254A to Pocatalico, West Virginia and Channel 233A to Dunbar, West Virginia, as a first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204 and 0.283 of the Commission's Rules, IT IS ORDERED, That effective December 26, 1986 the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED with regard to the following communities:

City	Channel No.
Dunbar, West Virginia	233A
Pocatalico, West Virginia	254A

4. The window period for filing applications for Channel 233A at Dunbar, West Virginia will open on December 29, 1986 and close on January 26, 1987 . The window period for Channel 254A at Pocatalico, West Virginia, will be announced at a later date.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia A. Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] Public Notice of this petition was given on February 25, 1986, Report No. 1569.

[3] The further comments were late-filed but were considered herein as they provided pertinent information to assist the Commission in rendering its decision.

[4] The allotment to Pocatalico is contingent upon Station WSIP-FM, Paintsville, Kentucky, receiving a license in accordance with a construction Permit reclassifying its facilities from a full Class C channel to a Class Cl channel, which is currently pending. Therefore, the filing window dates for Channel 254A at Pocatalico, West Virginia, will be announced at a future date to follow the licensing of Station WSIP-FM, accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-129

In the Matter of

Amendment of Section 73.202(b) RM-5286
Table of Allotments,
FM Broadcast Stations.
(Ozark, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 20, 1986 Released: November 19, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 51 FR 13536, April 21, 1986, in response to a petition filed by Ozark Entertainment Network ("petitioner"). The *Notice* proposed the allotment of FM Channel 225A to Ozark, Missouri, as that community's first FM broadcast service.[1] Petitioner filed comments expressing a continuing interest in the proposal. Great Radio Group, Inc. ("Great Radio"), licensee of Channel 252A, Station KSSC-FM, Columbus, Kansas, filed an opposition to which Ozark filed reply comments.

2. In its opposition comments, Great Radio expressed a desire to upgrade its existing facility to a Class C2 station on FM Channel 250. It states that its proposal is currently short spaced to three existing facilities – Station KUDL-FM, Kansas City, Kansas, Station KLZS-FM, Wichita, Kansas, and Station KNMO-FM, Nevada, Missouri. Stations KUDL-FM and KLZS-FM have been granted construction permits to move their transmitters to locations where the short spacing problem would be eliminated.[2] As to the Nevada, Missouri, station on Channel 249A, Great Radio concludes that Channel 225C2 could be allocated to Nevada, Missouri, and resolve the conflict. For those reasons, Great Radio opposes the allotment of Channel 225A to Ozark and instead requests the allocation of Channel 238A to that community.

3. Petitioner, in reply comments, points out that Great Radio's opposition is based on speculation that Great Radio and the facility at Nevada, Missouri, may at some future date, propose to upgrade their facilities and would be precluded by the allotment of Channel 225A at Ozark. It further states that Great Radio's proposal to allocate Channel 238A to Ozark overlooks the fact that it would conflict with a pending proceeding (RM-5236) to add Channel 238C2 to Pleasant Hope, Missouri, as that community's first local service. (See footnote 1) Petitioner points out that the licensee for the Nevada FM station has filed no comments in this proceeding. Great Radio indicates only that there have been extensive negotiations between itself and Nevada Broadcasting, Inc. which, in petitioner's opinion, is hardly the basis for denying the allocation of a first FM broadcast service to Ozark.

4. After careful consideration of the aforementioned, we find it is in the public interest to allocate FM Channel 225A to Ozark, Missouri, in order to provide a first FM broadcast service to that community. We do not believe that Great Radio's proposal is ripe for consideration at this time. The proposed substitution of a higher class channel at Nevada, Missouri, requires the licensee's consent before the Columbus upgrade can be accommodated. Furthermore, the proposal to substitute Channel 225C2 at Nevada would be short spaced to Station KSYN, Joplin, Missouri, and to Station KBEZ, Tulsa, Oklahoma, utilizing either the current site of Nevada Station KNMO-FM or at the site suggested by Great Radio. While Great Radio suggests that Channel 238A be allotted to Ozark, that channel has been proposed at Pleasant Hope, Missouri, as previously indicated in footnote 1. Finally, in order to allot Channel 225C2 to Columbus to permit an upgrade in its current operation, we would have to deprive Ozark or Pleasant Hope of a first local service. Such action would be inconsistent with the priorities set forth in *Revision of FM Policies and Procedures*, 90 FCC 2d 88 (1982).

5. Channel 225A can be allocated to Ozark in compliance with the minimum distance separation requirements provided there is a site restriction 7.2 kilometers (4.5 miles) north of the community. The site restriction will prevent a conflict with Channel 223, Station KSYN, Joplin, Missouri, and with a construction permit for Channel 226, Station KZLE, Batesville, Arkansas.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5 (c) (1), 303(g) and (r) of the Communications Act of 1934 as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDER, That effective December 26, 1986, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below:

Community	Channel No.
Ozark, Missouri	225A

7. The window period for filing applications will open on December 29, 1986, and close on January 26, 1987.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Although the petitioner originally requested the allocation of Channel 238A to Ozark, Missouri, that channel would be short spaced to a pending proposal to allocate Channel 238C2 to Pleasant Hope, Missouri, MM Docket 86-303. Therefore, we have substituted FM Channel 225A at Ozark.

[2] Station KUDL-FM, Kansas City, Kansas - BPH 831216CO
Station KLZS-FM, Wichita, Kansas - BPH 851125IC

Before the
Federal Communications Commission
Washington, D.C. 20554

Docket No. 85-374

In the Matter of

	RM-5015
Amendment of Section 73.606(b)	RM-5301
Table of Assignments,	
TV Broadcast Stations.	
(Twin Falls, Idaho)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 24, 1986 Released: November 19, 1986

By the Chief, Policy and Rules Division:

1. Before the Commission is the Notice of Proposed Rule Making, 50 FR 51434, December 17, 1985, which proposed to assign UHF television Channel 35 to Twin Falls, Idaho, as that community's second commercial television channel. The Notice was adopted in response to a petition filed by Ambassador Media Corporation ("petitioner"). The petitioner filed supporting comments reaffirming its intention to apply for the channel, if assigned. Additionally, King Broadcasting Company ("King") and American Community Broadcasting, Inc. ("ACBI") filed joint comments and a counter- proposal, seeking to assign Channel 68 to Twin Falls instead.[1] The petitioner filed reply comments.[2]

2. Twin Falls (population 26,209).[3], seat of Twin Falls County (population 52,927) is located in southern Idaho, approximately 185 kilometers (115 miles) southeast of Boise, Idaho. Twin Falls is presently assigned VHF Channels 11 and *13.[4]

3. King and ACBI, in comments, stress the fact that they have no objection to a second commercial channel at Twin Falls. However, they are concerned that Channel 35 will cause interference to their LPTV station in that community. They contend that while Channel 35 could adversely affect the overall availability of video services at Twin Falls, Channel 68 would likely result in a greater diversity of video services.[5] King and ACBI point out that because of the potential for interference between Channel 35 as a full service operation and the low power operations on Stations K38AS and K49AZ at Twin Falls, the three stations may not be able to co-exist. Reference is made to the delay and expense in changing the LPTV facility (which is presently under construction) in order to operate at Twin Falls. In further support of the request for Channel 68 as a substitute for Channel 35, and the impact of Channel 35 on LPTV service, reference is made to the proceeding of *KTCVO, Inc.* (KTVO-TV) 57 RR 2d 648, 650 (1984), where the Commission gave recognition to the importance of translator and LPTV services to underserved areas. They also cite the case of *Seattle and Tacoma, Washington*, 52 RR 2d 211,213 (1982) where the Commission recognized the public interest in not disturbing existing translator service, and *960 Radio Inc.*, FCC 85-578 n.5, released November 4, 1985, where the Commission, while noting that translator and LPTV service is secondary to full service television, has been sensitive to the significant dislocations such secondary status can create for the public. As an alternative to the counterproposal for Channel 68, they suggest that any construction permit for Channel 35 should be conditioned on the protection of existing LPTV stations operating at Twin Falls.

4. In reply comments, Ambassador argues that it does not wish to operate on Channel 68, as suggested by the joint commentors. With respect to the cases cited by King and ACBI, Ambassador deems them to be inappropriate here. Ambassador refers to the recent *Memorandum Opinion and Order* released February 11, 1986, FCC 86-72, Mimeo 36471, wherein the Commission articulated its position on the secondary nature of LPTV-translator service. Based on these arguments, the petitioner urges the Commission to assign Channel 35 to Twin Falls, as requested.

5. We agree with the petitioner regarding the priority of full service television stations over LPTV, when the issues relate to interference, resulting in channel substitutions. In making a decision here, we refer to Section 74.202(3)(b) of the Rule relating to LPTV service. In accordance with that Rule, changes in the Table of Assignments,Section 73.606(b), authorizations to construct new TV stations or change facilities of an existing station, may be made without regard to existing or proposed LPTV stations. Where such a change results in LPTV stations causing interference to a television station, the LPTV facility must eliminate the interference or change its channel of operation. See *Memorandum Opinion and Order*, FCC 86-76 (Mimeo No. 36476) released February 11, 1986. Although King and ACBI have indicated that several channels (including 68) are available for assignment to Twin Falls, the only expression of interest has been for Channel 35. Based on the above conclusions, we shall assign UHF television Channel 35 to Twin Falls, Idaho, as requested by the petitioner. Channel 35 at Twin Falls meets the spacing requirements of Section 73.610 of the Rules.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective December 26, 1986, the TV Table of Assignments, Section 73.606(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, to read as follows:

City	Channel No.
Twin Falls, Idaho	11, *13-, 35

7. IT IS FURTHER ORDERED, That the counterproposal by King Broadcasting Company and American Community Broadcasting, Inc. requesting the assignment of Channel 68 to Twin Falls, Idaho, IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the counterproposal was given on February 11, 1986, Report No. 1568.

[2] On March 4, 1986, after the date for filing responses (February 18, 1986), King and ACBI submitted a Motion for Leave to file supplemental comments. In accordance with the provisions of Section 1.45(c) and 1.415(d) of the Rules, no additional comments may be filed unless specifically requested or authorized by the Commission. Therefore, those comments will not be accepted for consideration.

[3] Population figures are taken from the 1980 U.S. Census.

[4] Channel *13, assigned to Twin Falls for noncommercial educational use, is presently occupied by educational translator Station K13LR.

[5] The engineering statement submitted with the counterproposal indicates that a number of UHF channels could be assigned to Twin Falls without affecting the authorized low power services in the community.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 18, 1986

COMMUNICATIONS SATELLITE CORPORATION AND CONTEL CORPORATION FILE APPLICATION FOR APPROVAL OF MERGER OF THE TWO COMPANIES PLEADING CYCLE ESTABLISHED

Communications Satellite Corporation (Comsat) and Contel Corporation (Contel) have filed an application requesting Commission approval for the merger of the two companies. After the merger, Comsat would be the parent corporation and Contel would become a wholly owned subsidiary of Comsat. The application includes requests for authority to transfer control of various licenses and authorizations. File No. ENF-87-05 has been assigned to the application for purposes of reference and coordination, even though separate file numbers have been assigned to the licenses and authorizations in the different services noted below.

DOMESTIC FIXED SATELLITE SERVICES

File Nos. 233-DSE-TC-(219)-86; 234-DSS-TC-(5)-86. Application for consent to transfer the domestic satellite earth and space station authorizations held by American Satellite Company from Contel to Comsat.

DOMESTIC PUBLIC FIXED RADIO SERVICES

File Nos.

467-CF-TC(1)-87 (Contel Systems of Missouri);

468-CF-TC(4)-87 (Continental Telephone Company of New York);

469-CF-TC(12)-87 (Continental Telephone Co. of North Carolina);

470-CF-TC(2)-87 (Continental Telephone Company of Kentucky);

471-CF-TC(2)-87 (Continental Telephone Company of West Virginia);

472-CF-TC((4)-87 (Continental Telephone Company of Maine);

473-CF-TC(14)-87 (Continental Telephone Company of Virginia);

474-CF-TC(11)-87 (Continental Telephone Company of Indiana);

475-CF-TC(7)-87 (Continental Telephone Company of Arkansas);

476-CF-TC(1)-87 (Continental Telephone Company of Kansas);

477-CF-TC(13)-87 (Continental Telephone Company of Missouri);

478-CF-TC(4)-87 (Continental Telephone Company of Illinois);

479-CF-TC(10)-87 (Continental Telephone Company of Minnesota);

480-CF-TC(94)-87 (Continental Telephone Company of California);

481-CT-TC(1)-87 (Continental Telephone Company of California);

482-CF-TC(1)-87 (Continental Telephone Company of the Northwest);

483-CF-TC(21)-87 (Continental Telephone Company of the West (UT);

484-CF-TC(13)-87 (Continental Telephone Company of the West (AZ);

485-CF-TC(11)-87 (Continental Telephone Company of the West (NM);

486-CF-TC(22)-87 (Continental Telephone Company of Texas);

487-CF-TC(68)-87 (American Satellite Company).

Applications for transfer of control of point-to-point microwave radio authorizations and local television transmission service.

INTERNATIONAL SERVICES

File No. ITC-87-024-(124). Application for consent to transfer international Section 214 authorizations held or requested by Comsat and affiliates, i.e. Comsat International Communications, Inc., Comsat General Corporation and International Business Earth Station.

Title III Authorization/Permit/License

File No. CSG-87-002-(95). Application for consent to transfer various licenses held or requested by Comsat International Communications, Inc., Comsat General Corporation and International Business Earth Station.

File No. CSG-87-003-(6). Application for consent to transfer various licenses held or requested by American Satellite Company, a subsidiary of Contel.

DOMESTIC PUBLIC LAND MOBILE RADIO SERVICES - CELLULAR RADIO - AND RURAL RADIO SERVICES

File Nos. 20485 through 20504-CD-TC-1-87; 60006 through 60014-CR-TC-1-87; 00040 through 00052-CL-TC-1-87. Application for consent to the transfer of control of the DPLMRS, cellular radio, and rural radio services authorizations and construction permits of individual Contel telephone operating companies and cellular subsidiaries from Contel to Comsat.

PRIVATE RADIO SERVICES

Applications regarding private radio and aircraft authorizations held by subsidiaries of Comsat and Contel are being submitted separately to the Private Radio Bureau in Gettysburg, Pennsylvania.

General Information

The transfer of control requests listed herein have been found, upon initial review, to be acceptable for filing. The Commission reserves the right to return any of these applications if, upon further examination, it is determined they are defective and not in conformance with the Commission's Rules or policies.

Parties wishing to comment on this application may do so no later than 30 days from the date of this notice. Reply comments should be filed no later than 10 days thereafter. All filings concerning this application, including any of the individual File Numbers except those assigned by the Private Radio Bureau in Gettysburg, Pennsylvania, should refer to File No. ENF-87-05.

Copies of the application and any subsequently filed documents in this matter may be obtained from International Transcription Services. Inc., 2100 "M" Street, N. W., Suite 140, Washington D. C. 20036, (202) 857-3800. The application and documents are also available for inspection and copying in Room 6206, 2025 "M" Street, N. W., Washington, D. C. 20554.

For further information contact Margaret Wood at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN SATELLITE COMPANY File No. CSG-86-066-P/L
ITT WORLD COMMUNICATIONS INC.

Application for authority to construct and operate an international multipurpose INTELSAT Standard A earth station at Vallejo, California

ITT WORLD COMMUNICATIONS INC. File No. I-T-C-86-160

Application for authority to establish channels of satellite communications through an international multipurpose INTELSAT Standard A earth station to be constructed at Vallejo, California

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: November 12, 1986 Released: November 19, 1986

By the Common Carrier Bureau:

1. The Commission is considering the above captioned two applications requesting authority pertaining to the construction and operation of an international multipurpose earth station. Application File No. CSG-86-066-P/L was filed jointly by American Satellite Company (ASC) and ITT World Communications Inc. (ITT Worldcom) on August 14, 1986. The joint application requests authority pursuant to Sections 304, 308, 309 and 319 of the Communications Act of the 1934, as amended, to Sections 201(c)(4), 201(c)(6), 201(c)(7) and 201(c)(9) of the Communications Satellite Act of 1962, as amended, to construct and operate an international multipurpose INTELSAT Standard A earth station at Vallejo, California to operate with an INTELSAT Pacific Ocean region satellite for the provision of all communications services that ASC and ITT Worldcom may now or hereafter be authorized to provide. Application File No. I-T-C-86-160 was filed by ITT Worldcom on August 14, 1986 and requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, and Sections 201(c)(4), 201(c)(6) and 201(c)(7) of the Communications Satellite Act of 1962, as amended, to: (a) establish international channels of satellite communications through the multipurpose earth station for which authority is requested by application File No. CSG-86-066-P/L; (b) acquire from the Communications Satellite Corporation (Comsat) 143 voice grade circuits; (c) acquire, install and operate necessary channelizing equipment capable of deriving up to 143 voice circuits; (d) acquire and operate the necessary domestic connecting facilities between the proposed Vallejo, California earth station and the ITT Worldcom operating center in San Francisco; and (d) utilize the foregoing facilities to supplement ITT Worldcom's existing facilities between the U.S. Mainland and those countries it is currently or may hereafter be authorized to serve via INTELSAT Pacific Ocean region satellites for the provision of all authorized services. These applications were placed on public notice on August 20, 1986. No comments were received in response to either application.

2. The proposed multipurpose earth station will be constructed to meet INTELSAT Standard A parameters and will utilize an 18 meter antenna. The earth station will operate with a INTELSAT Pacific Ocean region satellite in the 6/4 gigaHertz bands and will be located at ASC's existing National Network Earth Station and Terrestrial Microwave facility at Vallejo, California. Both ASC and ITT Worldcom plan to use the proposed earth station for the provision of INTELSAT Business Services (IBS) between the U.S. Mainland and Pacific Basin countries. Both ASC and ITT Worldcom have been granted blanket authority to establish and operate channels of communications between the U.S. Mainland and various overseas points for the provision of IBS.[1] In addition, ITT Worldcom proposes to transfer the 143 satellite circuits it now uses for the provision of its conventional international services to Pacific Basin points from the existing multipurpose earth stations at Jamesburg, California and Brewster, Washington to the proposed earth station at Vallejo, California.

3. The joint applicants indicate that the proposed earth station will be equipped with up and down converters, multiplexers and modems to permit the provision of Frequency Division Multiplex Frequency Modulation (FDM FM) analog services and Intermediate Data Rate (IDR) digital services in addition to IBS. Both analog and digital terrestrial connecting facilities will be available between ITT Worldcom's San Francisco operating center and the proposed earth station. As a result, the proposed earth station will be able to provide all communications services to the public and to other carriers. The joint applicants further indicate that the proposed multipurpose earth station will require a capital expenditure of approximately $2,478,855. Each applicant will bear approximately one-half of this capital cost.

Discussion

4. In its Report and Order in the *Earth Station Ownership* proceeding, CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concern about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the U.S. as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that, absent special problems, it would treat these applications as routine and expeditiously process them.

The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[3]

5. With respect to applications for construction of multipurpose earth stations, the Commission stated that it would continue to closely scrutinize such applications as they raise more complex economic, technical and operational issues and may affect the variety, quality and price of services offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would analyze the impact of a grant on the provision of earth station and space segment services. It would conduct this analysis by balancing the possible benefits (e.g. shorter terrestrial hauls, increased user options, lower charges to users and increased customer base for INTELSAT services) against possible detriments (reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[4] Because the international record carriers (IRCs) collectively generate only approximately 10 per cent of the international satellite traffic, the Commission concluded that any diversion of traffic from existing multipurpose earth stations by one or more IRCs or by new entrants was likely to be offset by growth in INTELSAT satellite traffic and, therefore, would not cause economic harm to the Earth Station Ownership Committee (ESOC) members[5] or to the public.[6]

6. The legal and technical qualifications of ASC and ITT Worldcom to construct and operate the proposed multipurpose earth station are well-established.[7] The proposed earth station complies with INTELSAT performance criteria for Standard A earth stations. ASC and ITT Worldcom have completed the necessary frequency coordination.

7. The joint applicants assert that the transfer of the Pacific Ocean region satellite circuits used by ITT Worldcom for the provision of its conventional services from the existing ESOC multipurpose earth stations at Jamesburg, California and Brewster, Washington to the proposed earth station will not produce adverse economic effects on the members of ESOC, INTELSAT or the public. ITT Worldcom currently routes only 136 FDM FM and 2 56 kilobit per second (kbps) Single Channel Per Carrier circuits through the Jamesburg earth station and 5 FDM FM circuits through the Brewster earth station. The joint applicants assert that these 143 circuits are a very small percentage of the circuits currently routed through those ESOC earth stations. INTELSAT will suffer no adverse economic effects since these 143 circuits will continue to be routed through an INTELSAT Pacific Ocean region satellite.

8. ASC and ITT Worldcom further assert that the primary benefit to customers of transferring these circuits to the proposed earth station will be a reduction in the length of the landline connecting facilities required to access the earth station from San Francisco which should drive down costs. New and existing customers will also benefit from the availability of FDM FM, IDR and IBS facilities for carriage of their traffic and from a major reduction in the time required to obtain connecting facilities to the earth station. The joint applicants state that AT&T has indicated that there is a shortage of connecting facilities to the Jamesburg earth station. According to the joint applicants, AT&T requires 40 working days to install analog connecting facilities to Jamesburg and from 9 to 13 months to install 56 kbps circuits, if such facilities are available. While AT&T plans to acquire additional analog connecting facilities to the Jamesburg earth station, it has stated it will not install digital connecting facilities. The joint applicants indicate that the installation period for service via the proposed earth station will be limited to only the time necessary to install connecting facilities between the customer's location and ITT Worldcom's San Francisco operating center.

9. We conclude that the public interest will be served by the construction and operation of the proposed INTELSAT Standard A multipurpose earth station at Vallejo, California. We find that the reduction in the length of the terrestrial connecting facilities required to access the proposed earth station from San Francisco when compared to the length of the terrestrial connecting facilities required to access the Jamesburg and Brewster earth stations should reduce the costs of providing Pacific Ocean region satellite services as well as decreasing the time required to implement new satellite circuits. The distance between the new earth station site and San Francisco is only 30 miles as compared with 89 miles between the Jamesburg earth station and San Francisco. The capability of the proposed earth station to provide FDM FM analog services, IDR digital services and IBS, coupled with the availability of digital and analog connecting facilities between the earth station and ITT Worldcom's San Francisco operating center should also benefit customers by making readily available a wide range of digital and analog satellite services.

10. We further find that transfer of ITT Worldcom's existing Pacific Ocean region INTELSAT satellite circuits used for the provision of conventional services to the proposed multipurpose earth station will not have a significant adverse effect on the owners of the Jamesburg and Brewster ESOC multipurpose earth stations or on the public. The 143 ITT Worldcom circuits proposed to be transferred represent only 3.4 per cent of the 4148 circuits reported by Comsat to be routed via the Jamesburg and Brewster earth stations as of August 31, 1986.[8]

11. We also find that the construction of the proposed multipurpose earth station will not adversely affect INTELSAT. As pointed out by the joint applicants, the existing ITT Worldcom circuits transferred to the proposed earth station will continue to be routed via an INTELSAT Pacific Ocean region satellite. Moreover, construction of the proposed multipurpose earth station would appear to be consistent with the goals underlying INTELSAT's recent decision to revise the parameters for INTELSAT Standard A earth stations to permit the use of smaller, less costly antennas in order to encourage the construction of additional multipurpose earth stations closer to population centers. INTELSAT believes that the lower cost for such INTELSAT Standard A earth stations, coupled with the reduced costs for shorter terrestrial connecting facilities to the earth stations will stimulate traffic, improve connectivity via more INTELSAT satellites and result in a greater retention of traffic by providing more effective competition to alternative transmission systems.[9]

12. Upon consideration of the applications, we find that authorization of the requested services and facilities is in the public interest.

13. Accordingly, IT IS ORDERED, pursuant to Sections 214, 304, 309 and 319 of the Communications Act of 1934 and Section 201(c) of the Communications Satellite Act of 1962, that applications File Nos. CSG-86-066-P/L and I-T-C-86-160 ARE GRANTED and:

A. ASC and ITT Worldcom are authorized to construct and operate the proposed INTELSAT Standard A multipurpose earth station at Vallejo, California for the provision of IBS and related digital video services[10] and for the provision of all communications services ASC and ITT Worldcom are now, or may hereafter be, authorized to provide;[11]
B. ITT Worldcom is authorized to:

1. acquire from Comsat the INTELSAT space segment in Pacific Ocean region satellites for 143 voice grade circuits;
2. acquire and operate the necessary channelizing equipment capable of deriving up to 143 voice grade circuits;
3. acquire and operate the necessary domestic connecting facilities between the Vallejo, California earth station and ITT Worldcom's San Francisco operating center; and
4. utilize the foregoing facilities to provide ITT Worldcom's authorized services to the Pacific Ocean region points listed in Appendix A and to such points served by INTELSAT Pacific Ocean region satellites as ITT Worldcom may be authorized in the future to serve.

Before the completion of equipment installation and facility activation, however, the applicants should provide the Commission with a summary of actual installed equipment.

14. The Section 214 authorization granted herein to ITT Worldcom is effective on the release date of this order and shall be continued year-to-year, unless the Commission notifies the applicants to the contrary and requires that a new application be filed. Should the Commission require that a new application be filed, the authorization will continue in effect until Commission action on the application.

15. The Commission retains jurisdiction over this matter to insure that all present and future authorized carriers have nondiscriminatory use of, and equitable access to, the communications satellite system and earth stations.

16. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between ASC and ITT Worldcom and their correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

17. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

APPENDIX

PACIFIC OCEAN REGION POINTS TO WHICH ITT WORLDCOM IS AUTHORIZED TO PROVIDE ITS AUTHORIZED CONVENTIONAL SERVICES

American Samoa Japan
Australia Korea
China, People's Republic Malaysia
Taiwan Marshall Islands
Fiji New Zealand
French Polynesia Northern Marianas
Guam Islands (Saipan)
Hawaii Papua New Guinea
Hong Kong Philippines
India Singapore
Indonesia Thailand

FOOTNOTES

[1] *See* ASC *et al.*, (File Nos. I-T-C-85-066 *et al.*), Mimeo No. 3220, (released March 18, 1985) and ITT Worldcom *et al.*, (File Nos. I-T-C-85-088 *et al.*), Mimeo No. 4010, (released April 18, 1985).

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] See the cases cited in Satellite Gateway Communications, Inc., (File Nos. I-T-C-86-045 *et al.*), Mimeo No. 2896 (released March 4, 1986) and American Telephone and Telegraph Co., (File Nos. CSG-86-013-P/L *et al.*), Mimeo No. 3327 (released March 25, 1986).

[4] 100 FCC 2d at page 284.

[5] The ESOC is the group consisting of Comsat and various U.S. international carriers which owns the existing multipurpose earth station in the United States mainland, Hawaii and Guam.

[6] 100 FCC 2d at pages 272-273.

[7] See American Satellite Co., (File No. CSG-86-048-P/L), Mimeo No. 7154 (released September 30, 1986) and ITT World Communications Inc., (File No. CSG-86-027-P/L), Mimeo No. 5197 (released July 6, 1984).

[8] See also the application of Comsat International Communications, Inc., File No. I-T-D-87-002, requesting authority to close the Brewster earth station, filed on November 3, 1986.

[9] *See* INTELSAT Board of Governors Document BG-66-21, Revised Earth Station Definitions and Expansion of Service to Small Earth Stations.

[10] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

[11] ASC and ITT Worldcom shall request authorization to acquire INTELSAT space segment from Comsat for the provision of new service products or for service to new geographical markets in accordance with the requirements of the Commission's International Competitive Carrier decision, International Carrier Policies, 102 FCC 2d 812 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

OFFSHORE TELEPHONE COMPANY REQUESTS EXTENSION FOR DUE DATE OF ITS RESPONSE TO COMMISSION'S INFORMATION REQUEST

Released: November 19, 1986

By letter dated October 23, 1986, Offshore Telephone Company (OTC) has asked for clarification of the Common Carrier Bureau's October 15, 1986 data request concerning Offshore Telephone Company's (OTC) request for membership in the National Exchange Carrier Association (NECA). OTC's October 23 letter also requests an extension of time to respond to the Bureau's information request. OTC's letter is available for public inspection in the Tariff Division's Public Reference Room, 1919 M Street, N.W., Room 513, Washington, D.C.

The Bureau's data request seeks information that will permit the Bureau to determine whether OTC makes available exchange access service and whether its costs and revenues should be pooled with those of current members of NECA's pools. To afford OTC additional time to compile the data described in the Bureau's October 15, 1986 letter, the Chief, Common Carrier Bureau, has indicated in a letter to OTC that the due date for OTC's response is deferred until December 15, 1986. OTC's response, which will be made available for public inspection and comment, should be filed with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C., 20554. Comments in response to OTC's filing must be filed not later than January 14, 1987. OTC's reply to comments is due not later than January 29, 1987.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-77

In the Matter of

Amendment of Section 73.202(b), RM-4935
Table of Allotments
FM Broadcast Stations.
(Mattoon, Illinois)

ERRATUM

Released: November 19, 1986

By the Chief, Allocations Branch:

1. On October 31, 1986, the Commission, by its Mass Media Bureau, released a Report and Order, in the above captioned proceeding allotting Channel 267A to Mattoon, Illinois. Inadvertently, the window filing date was omitted for Channel 267A at Mattoon. The window period for filing applications on this channel will open on December 9, 1986, and close on January 7, 1987.

Mark N. Lipp

Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Mountain States Telephone and Telegraph Company — Transmittal No. 13

Northwestern Bell Telephone Company

Pacific Northwest Bell Telephone Company

Tariff F.C.C. No. 1

ORDER

Adopted: October 21, 1986; Released: November 19, 1986

By the Chief, Common Carrier Bureau:

1. The above-captioned tariff revisions were filed by the Mountain States Telephone Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West) on behalf of Northwestern Bell (NWB) on August 22, 1986 in accord with Special Permission No. 86-817.[1] By this Transmittal, and an earlier filed Transmittal No. 3, NWB proposed, *inter alia*, to reduce earnings shortfalls in the basic interstate directory assistance (IDA) category by increasing IDA rates, excluding transport, for each state in NWB's operating area. The rates became effective August 30, 1986 and are scheduled to remain in effect through December 31, 1986.

2. Because Transmittal No. 13 amended Transmittal No. 3, the two were consolidated for consideration in the *Bureau Order* denying petitions for rejection or suspension and investigation of Transmittal No. 3 filed by the Direct Marketing Association (DMA) and Western Union Telegraph Company. *See* US West F.C.C. No. 1, Transmittal Nos. 3 and 13, Mimeo No. 6640, released Aug. 29, 1986 (*Bureau Order*). On the day the *Bureau Order* was released, DMA filed a second petition to reject, suspend or investigate Transmittal No. 13.

3. The second DMA petition objects to NWB's IDA rate increase, arguing that the proposed rates are unsupported. It asserts that NWB failed to reconcile the relationship over time between the cost and demand data submitted in support of the IDA rates because changes in NWB's projected IDA revenue requirement are not accompanied by comparable revisions in projected demand levels. Moreover, it asserts, according to NWB's actual data, demand for July 1985 is greater than that reported for August 1985. DMA argues that this variance in demand for consecutive months indicates that NWB's projections are questionable. Finally, it argues that NWB's measure of the duration of IDA calls is flawed in that NWB failed to adjust operator time to account for the use of Audio Response Equipment.

4. In its reply, NWB argues that DMA's petition should be denied since DMA's objections were addressed and disposed of in the *Bureau Order*.

5. The Common Carrier Bureau has reviewed the tariff, DMA's petition, NWB's reply and the *Bureau Order*. We agree with NWB that the arguments DMA advances with respect to Transmittal No. 13 essentially repeat those advanced in the petitions denied in the *Bureau Order*. No new argument has been raised which would warrant rejection or investigation of the IDA rates.

6. IT IS THEREFORE ORDERED that the petition filed against US West Tariff F.C.C. No. 1, Transmittal No. 13, by the Direct Marketing Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] By US West Tariff F.C.C. No. 1, Transmittal No. 13, NWB amended Transmittal No. 3 to reflect actual interstate directory assistance operating results for the October 1985 to May 1986 earnings period in support of the proposed directory assistance rates.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BUSINESS AND INDUSTRIAL MUSIC SERVICES, INC. ENF-86-17

NOTICE OF FORFEITURE

Adopted October 27, 1986 ; Released: November 20, 1986

By the Chief, Common Carrier Bureau:

1. On August 17, 1986 the Common Carrier Bureau issued a notice of apparent liability against Business and Industrial Music Services, Inc. (BIMS), a Multipoint Distribution Service (MDS) carrier operating in El Paso, Texas.[1] For the reasons set forth below, we find BIMS liable for a forfeiture of $2,000 for violation of Section 301 of the Act. 47 U.S.C. § 301.

2. In the *Notice*, we found that BIMS had operated MDS station WSL-59 in El Paso, Texas without the requisite authorization from the Commission in violation of the Act. This finding was based upon records on file with the Commission and information disclosed by an investigation conducted on our own motion. Records on file with the Commisson indicated that BIMS' license to operate MDS station WSL-59 had expired and further investigation revealed that BIMS had continued to operate the transmission facility subsequent to the expiration of its license. Thus, the Bureau concluded that BIMS had apparently violated the Act and proposed the imposition of a forfeiture in the amount of $2,000. The *Notice* afforded BIMS until September 8, 1986 to either pay the forfeiture or file a response showing why a forfeiture should be reduced or not be imposed. BIMS failed to provide any response whatsoever to the *Notice*. Therefore, based on our findings set forth therein, we conclude that BIMS is liable for a forfeiture of $2,000 for violation of Section 301 of the Act, 47 U.S.C. § 301.

3. Accordingly IT IS ORDERED pursuant to Section 1.80(f)(4) of the Commission Rules, 47 C.F.R. § 1.80(f)(4), that Business and Industrial Music Service, Inc. shall pay a forfeiture in the amount of $2,000 in the manner provided in Section 1.80(h) of the Rules within 30 days of the release date of this order.[2]

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Notice of Apparent Liability, Mimeo No. 6179 (released August 7, 1986) (*Notice*).

[2] Such a forfeiture amount should be paid by check or mail order drawn to the order of the Federal Communications Commission. The check or money should be mailed to the Fee Collection Section, Finance Branch, Federal Communications Commission, Box 19302, Washington, D.C. 20036, or delivered to the Fee Collection Section, Room 209, 1919 M St., N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-441

In re Applications of

GARCIA COMMUNICATIONS	File No. BPCT-860527KP
SUNSHINE TELEVISION, INC.	File No. BPCT-860728KL

For Construction Permit
Klamath Falls, Oregon

HEARING DESIGNATION ORDER

Adopted: October 31, 1986 Released: November 20, 1986

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 31, Klamath Falls, Oregon.

2. The effective radiated visual power, antenna height above average terrain and other technical data submitted by each applicant indicate that there would be a significant difference in the size of the area and population which would be served by each. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

3. No determination has been reached that the tower height and location proposed by Sunshine Television would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

4. On June 26, 1985, the Commission issued a Public Notice (Mimeo No. 5421) requiring all applicants for new broadcast stations to certify that they have obtained reasonable assurance that their specified transmitter sites will be available to them. Garcia has submitted a certification with a facsimile signature. Accordingly, Garcia will be given 20 days from the date of release of this Order to file an original certification, in the form required by the Commission, with the presiding Administrative Law Judge.

5. Section 73.3555(a)(3) of the Commission's Rules provides that no license for a television broadcast station shall be granted to any party if such party directly or indirectly owns, operates, or controls one or more television broadcast stations and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations. Note 5 to Section 73.3555 states that "paragraphs (a)-(d) of this Section will not be applied to cases involving television stations which are primarily "satellite" operations, and such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest." Sunshine is the licensee of station KDRV(TV), Medford, Oregon, and intends to operate the Klamath Falls station as a satellite of KDRV(TV). The predicted Grade B contours of the proposed television station and the licensed station would overlap. Garcia, however, apparently believes that the community can support a full-service station. In the past, we would have ordinarily specified an issue to determine the need for a satellite operation. In this case, however, the Commission has previously authorized a satellite, and given the small size of the market,[1] the need for a satellite would usually be presummed. *See Capitol Broadcasting Co.*, 54 R.R. 2d 811, 814 (1983). In these circumstances, the justification of a separate issue on the need for a satellite is not apparent. Instead, the applicants may introduce evidence as to the relative merits of their satellite and conventional proposals under the standard comparative issue.

6. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Sunshine Television, Inc., whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.
2. To determine, which of the proposals would, on a comparative basis, better serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

8. IT IS FURTHER ORDERED, That Garcia Communications shall file an original site availability certification, in the form required by the Commission, to the presiding Administrative Law Judge within 20 days after the release of this Order.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

10. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTES

[1] Klamath Falls is a part of the Medford market, which is ranked 155th by Arbitron. *Television & Cable* Factbook, 1986 edition, page A-3. If Klamath Falls were considered a separate market, it would be ranked significantly lower.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-440

In re Applications of

CHRISTOPHER GAULT	File No. BPCT-860220KF
EVANGEL COMMUNICATIONS, INC.	File No. BPCT-860410KN
COMMONWEALTH BROADCASTING CORPORATION	File No. BPCT-860410KO
ACHERNAR BROADCASTING COMPANY	File No. BPCT-860410KP
LINDSAY TELEVISION, INC.	File No. BPCT-860410KQ

For Construction Permit
Charlottesville, Virginia

HEARING DESIGNATION ORDER

Adopted: October 31, 1986 Released: November 20, 1986

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications of Christopher Gault, Evangel Communications, Inc. (Evangel), Commonwealth Broadcasting Corporation (Commonwealth), Achernar Broadcasting Company (Achernar), and Lindsay Television, Inc. (Lindsay) for authority to construct a new commercial television station on Channel 64, Charlottesville, Virginia; (2) a petition to deny filed by Worrell Broadcasting, Inc. (Worrell), licensee of television translator Station W64AO, Charlottesville, Virginia, against Christopher Gault; (3) an informal objection filed by the National Radio Astronomy Observatory (NRAO) against Evangel, Commonwealth and Achernar; and (4), an informal objection filed by the Association of Maximum Service Telecasters, Inc. (AMST) against Lindsay,[1] and related pleadings.

2. Worrell claims standing as a party in interest pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, on the grounds that operation of Gault's proposed television station would preclude the continued use of channel 64 by Worrell's translator station W64AO in Charlottesville, Virginia. We find that Worrell has standing. *International Broadcasting, Co.*, 3 FCC 2d 449 (1966).

3. Christopher Gault proposes to mount his antenna on the existing tower of Station WVIR-TV, Charlottesville, Virginia. On April 10, 1986, Worrell filed a petition to deny Gault's application based on the allegation that Gault does not have reasonable assurance that the proposed site specified in the application will be available to him. Worrell included an affidavit from Harold B. Wright, Jr., vice-president of Virginia Broadcasting Corp., licensee of station WVIR-TV, dated April 4, 1986, stating that he has not been contacted by Mr. Gault with respect to the use of the tower and that further loading of the tower would reduce the safety margin below design specifications. Therefore, Worrell states, Mr. Gault has misrepresented the availability of his proposed transmitter site. Mr. Gault did not respond to the petition. Instead, on May 9, 1986, he filed a new site availability certification. Neither certification bears an original signature, and the signatures do not appear to be by the same person. Additionally, since Gault did not amend his application to specify a different site, the application still specifies a site the availability of which remains in doubt. Consequently, issues will be specified to determine whether, at the time he filed his application, Gault had reasonable assurance that his site would be available to him and, if not, whether Gault made misrepresentations to the Commission; and whether Gault now has reasonable assurance that the site will be available to him.

4. Section 73.1030(a) of the Commission's Rules requires an applicant proposing to operate a broadcast station at a site within an area bounded by certain coordinates[2] to notify the National Radio Astronomy Observatory (NRAO), Green Bank, West Virginia, to determine if harmful electromagnetic interference would occur from the proposed station to the NRAO facilities.

An informal objection was filed against Evangel, Commonwealth, and Achernar by NRAO.[3] On May 27, 1986, Evangel and Commonwealth each filed an amendment moving their proposed sites outside NRAO's coordination boundaries. On April 29, 1986, Achernar notified the NRAO of its proposal, but NRAO informed the Commission on May 5, 1986, that it still objects to the Achernar proposal. Consequently, an appropriate issue will be specified.

5. Melanie Modlin is President and has a 50% voting stock interest in Commonwealth. Her husband, Edward L. Modlin, Jr., is an applicant for a new commercial FM station (BPH-851210MG) in Ruckersville, Virginia, and is also a member of Commonwealth's board of directors. Ruckersville is within the predicted Grade A contour of the proposed television station. There is a rebuttable presumption that the media interests of spouses are attributable to one another. *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *recon. granted in part*, 58 RR 2d 604 (1985). Consequently, grant of both applications would be inconsistent with Section 73.3555(b)(2) of the Commission's Rules.[4] Commonwealth, however, has stated that, in the event of a grant of both applications, it would take "appropriate steps" to ensure compliance with the multiple ownership rules. This, however, is not a specific undertaking by Melanie Modlin to divest her interest in the television applicant nor is it a specific undertaking by her husband to divest his interest in the FM applicant. Therefore, an appropriate issue will be specified.

6. No determination has been made that the tower height and location proposed by each of the applicants would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

7. The effective radiated visual power, antenna height above average terrain and other technical data submitted by each applicant indicate that there would be a signifi-

cant difference in the size of the area and population which would be served by each. Consequently, the areas and populations which would be within each predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Christopher Gault's proposed site is to be located 2.33 km from the directional array of AM station WCHV, Charlottesville, Virginia. Because of the proximity of the proposed tower to WCHV, grant of construction permit to Mr. Gault will be conditioned to ensure that WCHV's radiation pattern is not adversely affected by the construction of the proposed station.

9. The coordinates of the transmitter site shown on the contour map in Mr. Gault's application do not match the geographical coordinates specified in Section V-C, item 4. Accordingly, the applicant will be required to submit a new contour map consistent with the coordinates specified in Section V-C, item 4, and any related technical exhibits which would be affected by a change in coordinates, to the presiding Administrative Law Judge within 20 days after the release of this Order.[5]

10. Section 73.610 of the Commission's Rules requires a minimum separation of 248.6 km between a UHF station in Zone I and a UHF station or city to which the same channel (co-channel) is allocated. Mr. Gault's proposed site would be 242.3 km from Station WDPB(TV), Seaford, Delaware. The site would, therefore, be 6.3 km short-spaced. In addition, Evangel's site is 248.2 km from Station WDPB, producing a short-spacing of 0.4 km; Commonwealth's site is 237.3 km from Station WDPB(TV), producing an 11.3 km short-spacing and Lindsay's proposed site would be 240.8 km from Station WDPB(TV), producing a short-spacing of 7.8 km. Accordingly, an issue will be specified to determine whether circumstances exist which would warrant a waiver of Section 73.610 of the Rules. In assessing those circumstances, the Administrative Law Judge will consider the fact that Achernar has specified a full-spaced site.

11. Commonwealth's contour map provided in response to Section V-C, item 10, is incorrect. The Grade B contour miles shown in Section V-C, item 15, indicates varying distances; therefore, the contours on the map in Exhibit V-2 should show this variation. However, the map shows circular contours. Commonwealth will be required to submit a contour map reflecting the variations shown in Section V-C, item 15, to the presiding Administrative Law Judge within 20 days after the release of this Order.[6]

12. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Christopher Gault: (a) Whether, at the time he filed his application, he had reasonable assurance that his specified transmitter site would be available to him and, if not, whether he falsely certified its availability; (b) Whether he now has reasonable assurance that his specified site will be available to him and, if not, whether he has falsely certified as to its availability; (c) All of the facts and circumstances surrounding the filing of the site availability certifications bearing two different signatures; (d) Whether, in the light of the evidence adduced pursuant to the foregoing, he made misrepresentations to the Commission and, if so, the effect thereof on his basic qualifications.

2. To determine whether there is a reasonable possibility that operation by Achernar Broadcasting Company as proposed would result in objectionable interference to the conduct of radio astronomy activities by the National Radio Astronomy Observatory in the West Virginia "Quiet Zone."

3. To determine with respect to Commonwealth Broadcasting Corporation whether Melanie Modlin's interest in the proposed television station, and Edward L. Modlin, Jr.'s, interest in the applicant for the new FM station in Ruckersville, Virginia, are consistent with Section 73.3555 of the Commission's Rules, and, if not, whether common ownership, operation or control of a television station in Charlottesville, Virginia and an FM station in Ruckerville, Virginia, would be consistent with the public interest.

4. To determine with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

5. To determine with respect to each of the applicants, except Achernar, whether its proposal is consistent with Section 73.610 of the Commission's Rules and, if not, whether circumstances exist which would warrant a waiver of the rule.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

14. IT IS FURTHER ORDERED, That the informal objection filed by the Association of Maximum Service Telecasters against Lindsay IS DISMISSED as moot.

15. IT IS FURTHER ORDERED That the informal objection filed by the National Radio Astronomy Observatory IS GRANTED to the extent indicated and otherwise IS DENIED.

16. IT IS FURTHER ORDERED That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 4.

17. IT IS FURTHER ORDERED, That Worrell Broadcasting, Inc. IS MADE A PARTY RESPONDENT to this proceeding.

18. IT IS FURTHER ORDERED, That the National Radio Astronomy Observatory IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 2.

19. IT IS FURTHER ORDERED, That, in the event of a grant of the application of Christopher Gault, it will be conditioned as follows:

Prior to construction of the tower authorized herein, permittee shall notify AM Station WCHV so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C. to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, prior to or simultaneous with the filing of the application for license to cover this permit, the results submitted to the Commission.

20. IT IS FURTHER ORDERED, That Christopher Gault shall submit an amendment providing a new contour map as described in paragraph 9, and any related technical exhibits to the presiding Administrative Law Judge within 20 days after the release of this Order.

21. IT IS FURTHER ORDERED, That Commonwealth Broadcasting Corporation shall submit an amendment providing an accurate contour map based on the contour distances set forth in Section V-C, item 15, FCC Form 301, to the presiding Administrative Law Judge within 20 days after this Order is released.

22. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the parties respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTES

[1] AMST filed an informal objection on the grounds that Lindsay's proposed tower site would be short-spaced by 22 kilometers to Station WCVW(TV), Channel 57, Richmond, Virginia. On May 27, 1986 Lindsay filed an amendment changing its antenna site to a location which meets the Commission's minimum separation requirements. Therefore, the informal objection will be dismissed as moot.

[2] The coordinates are 39 degrees 15' North Latitude on the north; 78 degrees 30' West Longitude on the east; 37 degrees 30' North Latitude on the south; and 80 degrees 30' West Longitude on the west.

[3] NRAO did not file an informal objection against the Gault and Lindsay applications.

[4] Section 73.3555(b)(2) of the Rules proscribes common ownership, operation or control of a television station and an FM station if the principal community of the FM station would be within the predicted Grade A contour of the television station. Note 5 to the rule, however, provides for a case-by-case determination as to whether such common ownership, operation or control would be in the public interest in the case of a UHF television station.

[5] The applicant should note that the adjustments which must be made in its contour map may also require changes in the area and population figures it has submitted.

[6] See footnote 6 above.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-439

In re Applications of

BAYAMON CHRISTIAN NETWORK, INC. File No. BPCT-860508KG

Raul Salib and Rosidalia Vallafane d/b/a TELE BAYAMON BROADCASTING File No. BPCT-860624KH

For Construction Permit
Bayamon, Puerto Rico

HEARING DESIGNATION ORDER

Adopted: October 28, 1986 Released: November 20, 1986

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications of Bayamon Christian Network, Inc. and Raul Salib and Rosidalia Vallafane d/b/a Tele Bayamon Broadcasting for authority to construct a new television station on Channel 36, Bayamon, Puerto Rico.

2. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

3. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.
2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

4. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and to present evidence on the issues specified in this Order.

5. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TEL/MAN, INC.,

Complainant,

v. File No. E-86-02

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

Defendant.

ORDER

Adopted November 12, 1986 ; Released November 19, 1986

By the Common Carrier Bureau:

1. Before us is a Joint Motion to Dismiss Complaint and Accept Settlement Agreement filed in the above-captioned proceeding. The parties state that they have entered into a settlement agreement which resolves the complaint. They allege that the agreement is in conformance with Commission policies and rules. Therefore, they request that the agreement be approved as in the public interest and that the complaint be dismissed with prejudice.

2. Tel/Man, Inc.'s ("Tel/Man") complaint alleged that Southern Bell Telephone and Telegraph Company ("Southern Bell") intended to improperly apply Feature Group A charges to local lines ordered by Tel/Man for the resale of interLATA MTS service. These lines would be connected to the outgoing side of Tel/Man's switch and used to access AT&T's MTS service on an overflow basis. Following settlement negotiations between the parties, Southern Bell agreed that, under existing provisions of the interstate access tariffs and Commission orders, Feature Group A charges are not applicable to the lines described in Tel/Man's complaint, and that it would bill Tel/Man accordingly. The parties state that the settlement reached resolves all outstanding disputes as to these lines.

3. Under Section 1.713 of the Commission's Rules, 47 C.F.R § 1.713, we must determine whether authorization of a settlement agreement is consistent with the public interest. We have reviewed the terms of the settlement agreement and find that authorization of it and dismissal of the complaint would be consistent with our rules and the public interest: Therefore, we will grant the unopposed joint motion of the parties to dismiss the complaint and terminate the proceeding.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, that the Joint Motion to Dismiss Complaint and Accept Settlement Agreement IS GRANTED.

5. IT IS FURTHER ORDERED, pursuant to the same authority and Section 1.713 of the Rules, that the settlement agreement IS AUTHORIZED.

6. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

THE LINCOLN TELEPHONE AND TELEGRAPH COMPANY File No. 37955-CL-P-172-B-86

For authority to construct and operate a cellular system on frequency block B in the Domestic Cellular Radio Telecommunications Service to serve the Lincoln, Nebraska Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted November 12, 1986; Released November 19, 1986

By The Common Carrier Bureau:

1. On July 25, 1986, the Commission announced by *Public Notice* (Report No. CL-86-231) that The Lincoln Telephone & Telegraph Compant (LT&T) had been granted a construction permit for a cellular system on frequency block B in the Domestic Cellular Radio Telecommunications Service to serve the Lincoln, Nebraska Metropolitan Statistical Area (MSA). On November 6, 1986, Natubhai Patel (Patel), the non-wireline tentative selectee in the Lincoln MSA, filed a Petition for Deferral of Operating Authority.

2. In *Ameritech Mobile Communications, Inc.*, FCC 85-301, released July 14, 1985; *recon. denied*, FCC 86-281, released June 6, 1986, we stated that petitions for deferral of operation authority "may be filed within 14 days of public notice of a wireline covering license application" Since LT&T has not yet filed its application for a covering license and since such an application has not, therefore, been placed on public notice, the petition filed by Patel is untimely filed.

3. In light of the above, IT IS ORDERED, That the Petition for Deferral of Operating Authority filed by Natubhai Patel IS RETURNED AS UNTIMELY FILED.

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

OVERSEAS TELECOMMUNICATIONS, INC. File No. I-T-C-86-163

Application for authority to establish channels of communication between the U.S. and INTELSAT satellites for provision of international television service

ERRATUM

Released November 19, 1986

By the Common Carrier Bureau:

1. The captioned Memorandum Opinion, Order and Authorization authorizes Overseas Telecommunications, Inc. to provide international television service. The adopted date of October 30, 1986 was inadvertantly inserted into the Order. The correct adopted date is September 30, 1986.

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

C.J.
COMMUNICATIONS File No. 3147a-CL-P-263-A-86

For construction permit to
establish a cellular system
operating on frequency Block A
in the Domestic Cellular Radio
Telecommunications Service to
serve the Florence, South
Carolina Metropolitan Statistical
Area

ORDER ON RECONSIDERATION

Adopted November 14, 1986; Released November 19, 1986

By the Chief, Common Carrier Bureau:

1. C.J. Communications ("C.J.") has filed a letter on October 20, 1986, requesting that the captioned application which had previously been returned as defective be accepted for filing in the Florence, SC market. The Mobile Services Division ("MSD") returned the captioned application as unacceptable for filing. *See* Public Notice, Report No. CL-86-286, Mimeo No. 6956 (released Sept. 17, 1986). Alternatively, C.J. requests that its application be conditionally accepted in the Florence market (Market No. 264) lottery. For the reasons stated below, we conclude that C.J.'s requests should be denied.[1]

2. C.J. argues that its application for Florence, SC, Market No. 264, inadvertently referenced Market No. 263 on the cover of the application. According to C.J., this incorrect market number was due to a typographical error, as indicated by an affidavit by the application preparer which has been attached to C.J.'s letter. C.J. asserts that in the alternative, the captioned application should be conditionally accepted for inclusion in the upcoming 264 market lottery, as was previously done by the MSD under identical circumstances in the George Barber case[2] because C.J. "would probably not have sufficient time for the filing and disposition of a petition for reconsideration." C.J. letter at para. 3.

Discussion

3. C.J.'s application admittedly failed to comply with the requirements of Section 22.913(b)(2) of the rules, which requires that "The applicant's name and the market, *market number* and frequency block *applied formost appear* on the cover of the application." (Emphasis added). We cannot accede to C.J.'s request that its application be accepted for filing. The Commission's requirements were intended to speed processing and avoid the year-long delay previously encountered with prescreening applications. *See generally Further Order on Reconsideration*, 59 Rad. Reg. 2d (P&F) 407 (1985). We stated that each application must contain a certification stating that the application is complete and contains all of the information required by Form 401 and our cellular application rules. ". . . Failure to comply with the foregoing will result in the application being returned as unacceptable for filing." *Id.* Moreover, we have emphasized repeatedly that applications failing to comply precisely with the initial filing requirements would be dismissed. No exceptions were provided for "typographical" errors and no amendments are permitted prior to lottery. Section 22.918(b).[3]

4. Turning our attention to C.J.'s alternative request that its application be conditionally accepted for inclusion in the upcoming 264 market lottery, we likewise find no basis to do so. C.J.'s reliance on the *Barber* case is misplaced. There, it was pointed out that since the MSD's action returning the application did not leave sufficient time for the filing and disposition of a petition for reconsideration prior to the scheduled lottery, Barber's application was conditionally included in the appropriate market. We find that such is not the case here. Unlike *Barber*, there will be sufficient time for the filing and disposition of a petition for reconsideration prior to the scheduled lottery.

5. For the foregoing reasons discussed above, we find that C.J.'s arguments presented herein fail to demonstrate that either of C.J.'s requests should be granted. Consequently, we affirm the return of the involved application as unacceptable for filing.

6. Accordingly, IT IS ORDERED that the October 20, 1986, letter seeking alternative relief and reinstatement of the application of C.J. Communications, File No. 3147a-CL-P-263-A-86, IS DENIED.

7. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] While C.J. has filed its letter without referring to it as a petition for reconsideration of the MSD's action, we nonetheless view such letter to be in the nature of a petition for reconsideration of the MSD action. C.J.'s letter seeks relief normally sought by such petition, namely, reinstatement of the application.

[2] *See* Letter to George W. Barber, Jr. from Chief, Mobile Services Division (Apr. 15, 1986) in File No. 24522-CL-P-137-A-86 (hereinafter, " *Barber* "), a copy of which has been attached to C.J.'s letter in support of its position.

[3] *Contrast* Section 22.23(g)(5), which provides that major amendments to applications may be filed without rendering the application as newly filed, where the amendment merely corrects certain typographical mistakes.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-174

In the Matter of

Amendment of Parts 2 and 94 of the Commission's Rules to Accommodate Radio Local Area Network Stations in the 1700-1710 MHz Band — RM-5072

ORDER FURTHER EXTENDING REPLY COMMENT PERIOD

Adopted: November 14, 1986 Released: November 19, 1986

By the Acting Chief, Private Radio Bureau

1. On May 1, 1986, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*) in the above captioned matter. This *Notice* appeared in the Federal Register, 51 FR 19570, on May 30, 1986. Comments were due by August 22, 1986. Reply comments were previously extended to November 14, 1986.

2. On November 7, 1986, Motorola, Inc. filed a request to further extend the time period for filing reply comments in this proceeding to December 19, 1986. This request is supported by the National Oceanic and Atmospheric Administration (NOAA). Motorola and NOAA are jointly ascertaining potential interference from radio local area network transmitters to meteorological satellite data reception. Both indicate that while initial testing yielded useful information, additional time for computer simulation and further testing is needed to provide relevant information for the Commission's consideration.

3. We recognize the importance of the issue of potential interference between radio local area networks and meteorological satellite receivers. Therefore, to permit the gathering of adequate information concerning interference between such systems, we are further extending the reply comment period to assure a complete record in this proceeding.

4. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules and Regulations, that interested parties will have until December 19, 1986 to file reply comments in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael T.N. Fitch
Acting Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application for review of action taken under delegated authority which denied a request by Custard, Inc. that a competitor's public coast station license be revoked. PR 4116-S

ERRATUM

Released: November 19, 1986

The Memorandum Opinion and Order (FCC 86-461) released November 7, 1986, in the above-entitled matter is corrected to delete the docket no. assigned.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TEL-OPTIK,
LIMITED File No. SCL-86-003-2-(TC)

Request for Approval of
Pro Forma Transfer of
Control

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1986 Released: November 19, 1986

By the Common Carrier Bureau:

1. The Commission has before it for consideration the above captioned application (the *Pro Forma* application) filed on August 12, 1986. In the *Pro Forma* application, Tel-Optik, Limited (Tel-Optik), its shareholders and its trustees request expedited grant of the *pro forma* transfer of control of Tel-Optik to a trust (the trust), the three trustees of which control the majority of the voting common stock of Tel-Optik. The requested transfer of control to the trust constitutes the first step of a two-step process by which NYNEX Development Company (NYNEX Development) seeks to acquire control of Tel-Optik.[1]

2. Tel-Optik is a Delaware corporation which possesses Commission license to land and operate two private transatlantic fiber optic cables.[2] Tel-Optik's proposed cables would provide bulk transmission capacity to users on a non-common carrier basis. The cables are scheduled for operation in 1989 and 1992, respectively. The foreign end of the proposed cables would land in the United Kingdom and would be owned by Cable and Wireless PLC (C&W), a company organized under the laws of England; the U.S. end of the proposed cables would land in the New York City area.[3] The proposed cable system is referred to collectively as "Market Link." Tel-Optik's trustees currently hold over 51 percent of the corporation's voting common stock. These trustees are: the E. F. Hutton Trust Company, a wholly owned subsidiary of the E. F. Hutton Group, Inc., two officers of which are Directors of Tel-Optik; Ronald D. Coleman, Chairman of the Board and Chief Executive Officer of Tel-Optik; and James J. McGillan, Secretary and General Counsel of Tel-Optik. NYNEX Development, a Delaware corporation, is a wholly owned subsidiary of NYNEX Corporation, one of seven Regional Bell Operating Companies. These entities were formed in connection with the divestiture by the American Telephone and Telegraph Company of its 22 wholly owned Bell local exchange companies. Other subsidiaries of NYNEX Corporation include New York Telephone Company and New England Telephone Company.

3. The *Pro Forma* application was placed on public notice on August 20, 1986. Comments were filed by the American Telephone and Telegraph Company (AT&T) and NYNEX Corporation. Reply comments were filed by Tel-Optik and NYNEX Corporation.

4. As proposed in the *Pro Forma* and Transfer to NYNEX Development applications, Tel-Optik would remain the licensee to land the Market Link cables under the control of the trust or NYNEX Development, respectively. Appended to the *Pro Forma* application is a Stock Purchase and Trust Agreement (Trust Agreement), dated August 11,. 1986, among Tel-Optik, its shareholders, its trustees and NYNEX Development providing for the sale subject to specified conditions of all shares of Tel-Optik stock to the trust. The Trust Agreement states that NYNEX Development will: pay $3 million to Tel-Optik, upon the execution and delivery of the Trust Agreement and the Conditional Purchase Agreement[4] ; and pay an additional $7 million to Tel-Optik at the closing of the Trust Agreement.

5. In the *Pro Forma* application, the applicants claim that the proposed transfer of control to the trust is *pro forma* because the trustees are or represent Tel-Optik shareholders currently holding a majority of the corporation's voting common stock. These applicants maintain that, as the control of the corporation would for practical purposes remain unchanged if the trust were to acquire the corporation, the *Pro Forma* application may be granted expeditiously. The applicants state that the Trust Agreement requires that the trustees and interim directors shall be insulated from any influence by NYNEX Development and from specified communications by NYNEX Development personnel and shall strive to assure continuity of management of Tel-Optik during the trust period. The applicants add that if the transfer from the trust to NYNEX Development is denied, the trustees are directed to seek a new purchaser for Tel-Optik or, if no purchaser can be obtained, return the stock to the existing shareholders. The applicants also state that the trust vehicle has been selected so that the acquisition of Tel-Optik by NYNEX Development may be completed within a commercially reasonable time, thereby making NYNEX Development's bid competitive with those of other non-regulated bidders. The applicants stress that, in light of the federal approvals necessary to successfully transfer Tel-Optik to NYNEX Development, a single step transfer directly to NYNEX Development would require such delays as to make the latter's bid commercially unacceptable.[5] The applicants further state that the two-step arrangement was selected to allow Tel-Optik to honor agreements with parties for the construction and operation of the authorized fiber optic cables.

6. In its comments, NYNEX Corporation urges that we approve the *Pro Forma* application. It suggests that grant of the application is a necessary step in the transfer of control of Tel-Optik by NYNEX Development. NYNEX Corporation concludes that NYNEX Development's acquisition of Tel-Optik would promote competition in international services by injecting a competitor with substantial resources and significant capacity in markets now duopolized by AT&T and the Communications Satellite Corporation.

7. AT&T, in its comments, takes no position on the substantive aspects of the *Pro Forma* application. It states that it does not oppose prompt Commission action concerning the application.

8. In its reply comments, Tel-Optik states that, in light of the comments filed in the proceeding, it is clear that there is no reasonable justification for any further delay of the *Pro Forma* application. Tel-Optik comments that

the trustees' ownership or control over a majority of Tel-Optik's stock will ensure continuity of management during the trust period.[6]

9. We found in our *Private Submarine Cable* decision that we need not look beyond the Cable Landing License Act, 47 U.S.C. §§34-39 (1964), in examining Tel-Optik's application for a license to land and operate cables for non-common carrier service between the United States and foreign countries.[7] Similarly, applications to transfer control of Tel-Optik are governed by the Cable Landing License Act.[8] The Act is intended to protect the interests of the United States in connection with the issuance of cable landing rights. The Act does not specify criteria for evaluating applications for *pro forma* transfers of control of entities holding cable landing licenses. However, the Commission has considered several requests for *pro forma* transfers of control of entities holding radio licenses, pursuant to Section 309 of the Communications Act of 1934, 47 U.S.C. §309 (1976).

10. After considering the *Pro Forma* application in light of the relevent Commission precedent, we find that a grant of the application would promote U.S. interests. The Commission's policy is that our processes must not be allowed to favor one corporate suitor over another.[9] Here, the use of the trust mechanism is essential to enable the shareholders of Tel-Optik to consider NYNEX Development's bid on equal terms with other offers. In order to consummate a purchase of Tel-Optik, NYNEX Development, as the subsidiary of an RBOC, is required to obtain a waiver of the MFJ from the District Court of the District of Columbia and to comply with the somewhat time-consuming requirements specified in the Hart-Scott-Rodino Act, 15 U.S.C. §18a (1984).[10] The proposed trust mechanism allows the shareholders to sell their licensee corporation in a timely fashion, while allowing NYNEX Development the opportunity to compete equally in the marketplace.

11. The use of trustee arrangements has been sanctioned by the Commission when the separation between the acquiring company and the trustees is sufficient and the duration of the trust is short.[11] We find that the Trust Agreement ensures strict separation between NYNEX Development and the trust, preventing any premature transfer of control to the latter. Tel-Optik will remain in the control of trustees who control a majority of its current voting common stock. The Trust Agreement obligates the trustees to maintain independence and assure, to the extent possible, the continuity in management of the corporation during the trust period. Moreover, the trust period is of limited duration, ending either with the Commission approving transfer of the trust to a third party such as NYNEX Development, or with the return of the Tel-Optik stock to the existing shareholders. Finally, the Trust Agreement contains no provision which we consider anti-competitive or otherwise contrary to the interests of the United States.

12. In view of the foregoing, IT IS ORDERED, pursuant to 47 U.S.C. §§34-39 (1964), that the application (File No. SCL-86-003-2-(TC)) of Tel-Optik, Limited, its shareholders and its trustees for *pro forma* transfer of control of Tel-Optik, Limited to a trust specified in the application is GRANTED.

13. IT IS FURTHER ORDERED that the terms and conditions imposed on the cable landing license granted to Tel-Optik, Limited, File Nos. I-S-C-L-84-002, I-S-C-L-84-003, Mimeo No. 4618 (released May 17, 1985), shall remain in effect after control of the corporation has been transfered as proposed in the application granted herein.

14. This order is issued under Section 0.291 of the Commission's Rules and Regulations, 47 C.F.R. §0.291 (1985), and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (see Section 1.4 (b) (2).

FEDERAL COMMUNICATIONS COMMISSION

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] In Application File No. SCL-86-003-1-(TC) (the Transfer to NYNEX Development application), also filed August 12, 1986, Tel-Optik, its trustees and NYNEX Development request grant of the transfer of control of Tel-Optik from the trust to NYNEX Development.

[2] Tel-Optik, Limited (File Nos. I-S-C-L-84-002, I-S-C-L-84-003), Mimeo No. 4618 (released May 17, 1985).

[3] While the cables were authorized to land in New Jersey, we have been informed that Tel-Optik now plans to land the cables in New York State. To receive the necessary amended license to land the cables in New York State, Tel-Optik must file with the Commission information amending its original application for a cable landing license.

[4] The Conditional Purchase Agreement, dated August 11, 1986, among Tel-Optik, its trustees, NYNEX Development and C&W provides for the conditional sale of all shares of Tel-Optik stock from the trust to NYNEX Development. It was attached to the Transfer to NYNEX Development application. This agreement was amended, on November 17, 1986, in response to a letter from the Chief, Common Carrier Bureau to James J. McGillan, Esq., Tel-Optik, Ltd. (November 4, 1986).

[5] The applicants maintain that, as an RBOC subsidiary, NYNEX Development is prohibited under Section II(D) of the Modification of Final Judgement (MFJ) approved in United States v. Am. Tel. & Tel., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983), from providing interexchange communications services. The applicants add that NYNEX Development must obtain a waiver of this provision from the U.S. District Court for the District of Columbia, pursuant to Section VIII(C) of the MFJ, in order to acquire Tel-Optik and operate the Market Link cables.

[6] In its reply comments, NYNEX Corporation takes no position with respect to the *Pro Forma* application.

[7] The Commission has been delegated authority to enforce the Act by the President of the United States. *See* Executive Order No. 10530, dated May 10, 1954. The Commission's authority to enforce the Act was conditioned upon the Commission's not granting or revoking licenses without first obtaining approval of the Secretary of State and any advice from any executive branch department or establishment of the Government as it may deem necessary. As the proposed transfer of control considered herein is *pro forma*, *i. e.* it would not constitute a substantive change in ownership or control of the licensee, the Commission is not required to seek approval of the executive branch prior to granting the *Pro Forma* application.

[8] While there is no proposal for common carrier use of Market Link cables, we have not precluded such use. Common carriers which propose to purchase and use bulk capacity on the system would be required to apply for authority pursuant to Title II of the Communications Act of 1934, 47 U.S.C. Title II (1976), prior to acquiring capacity and providing service over the system. Private Submarine Cable decision, 100 FCC 2d 1033, 1048. *See also* International Carrier Policies (International Competitive Carrier), 102 FCC 2d 812, 845 (1985).

[9] Communications Industries, Inc., *et al.* (File No. 24278-CD-TC-1-85), Mimeo No. 0770 (released November 8, 1985); One Two Corporation (Multimedia), 58 RR 2d 924 (1985).

[10] That act provides, with respect to proposed transfers of corporate stock falling under certain specified criteria, for notification and review by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice. The receipt of such notification triggers a waiting period which must expire or be terminated before the parties may procced with the transaction. Transfers of corporate stock in which the acquiring party owns in excess of 50 percent of the transferor prior to the transaction are exempt from the notification requirements of the Act.

[11] *E.g.*, Communications Industries, Inc., *Id.* ; Multimedia, Id.; Westinghouse Broadcasting Co., 84 FCC 2d 938 (1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

DAMA TELECOMMUNICATIONS CORP. — File Nos. 10313 and 10318-CDM-P-82

To Construct Digital Termination Systems in the Dallas and Houston, Texas Standard Metropolitan Statistical Areas

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 1986 Released: November 20, 1986

By the Common Carrier Bureau:

1. The Bureau has before it applications filed by Dama Telecommunications Corp. (Dama), an extended network applicant in the Digital Electronic Message Service (DEMS), to construct digital termination system (DTS) facilities in the Dallas and Houston, Texas SMSAs on channel 31 in the 18 GHz band.

2. Dama initially filed applications for channel 5 in the 10 GHz band in these SMSAs. Because those applications were mutually exclusive with other parties' applications, Dama moved to amend its applications to channel 6 in the 10 GHz band. Digital Termination Service, Inc. (DTSI) petitioned to deny the proffered amendments on the grounds that they were cut-off by DTSI's previously-filed applications for channel 6 in Dallas and Houston. Dama's amendments were subsequently returned, rendering DTSI's petition moot.

3. Dama subsequently freed for grant its applications in Dallas and Houston by amending to channel 31. We find that these applications are in accordance with the Commission's rules and regulations and that grant of these applications will serve the public interest, convenience and necessity.

4. Accordingly, IT IS ORDERED that DTSI's petition is DISMISSED AS MOOT.

5. IT IS FURTHER ORDERED that Dama's applications for Dallas and Houston (File Nos. 10313 and 10318-CDM-P-82) are GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MIDWEST CABLE &
SATELLITE, INC. File No. 9089-CM-P-83

For a construction permit to build
a Multichannel Multipoint Distribution)
Service facility on Channel Group E
at Denver, Colorado

MEMORANDUM OPINION AND ORDER

Adopted November 11, 1986 Released November 20, 1986

By the Common Carrier Bureau:

1. The Common Carrier Bureau has before it for consideration: (1) the above-captioned application of Midwest Cable & Satellite, Inc. (Midwest) for authority to construct and operate a Multichannel Multipoint Distribution Service facility on Channel Group E at Denver, Colorado: (2) a petition to deny filed by United Cable Television of Colorado, Inc., United Cable Television of Jeffco, Inc., Mountain States Video, Inc., and Mountain States Video Communications Co., Inc. (collectively "United"); (3) a petition to deny filed by Denver Area Educational Television Consortium, Inc. ("DAETC"); and (4) related pleadings and amendments.

BACKGROUND

2. The Commission, in 1983, reallocated two groups of frequencies (Group E and Group F) from the Instructional Television Fixed Service ("ITFS") to the Multipoint Distribution Service thereby creating the Multichannel Multipoint Distribution Service ("MMDS").[1] Each of the reallocated frequency groups is composed of 4 channels containing 6 MHz of bandwidth suitable for wide band video transmission.[2] The Commission decided to employ lotteries to grant MMDS construction permits when more than one applicant had applied for one of the reallocated frequency groups in the same area. The Commission also modified its standard procedures to provide for the filing of post-lottery petitions to deny, only against the tentative selectee of the lottery.[3]

3. As a result of a lottery held on September 27, 1985, Midwest was selected as the tentative permittee to construct a new MMDS facility to operate on Channels E1, E2, E3 and E4 at Denver, Colorado. Midwest's qualifications thereafter were challenged in petitions to deny filed by United and DAETC.

PLEADINGS

4. United's sole allegation is that Midwest has failed to demonstrate its financial qualifications to be a MMDS licensee. DAETC requests the Commission to deny Midwest's application on three grounds: (1) that the antenna site specified by Midwest will not be available due to local zoning considerations; (2) that Midwest's operation of the requested MMDS facility will cause harmful and unacceptable interference to DAETC's authorized ITFS system in violation of the Commission's Rules; and (3) that Midwest's operation will receive extensive interference from DAETC's system. Midwest has filed a consolidated opposition to both petitions. In addition Midwest has tendered amendments to its application providing, *interalia*, a revised financial showing and a modified engineering proposal. DAETC also objects to Midwest's attempt to amend its application. For the reasons set forth below, we find that neither petitioner has raised a substantial and material question of fact that calls for further administrative proceedings. Therefore, both petitions will be denied.

UNITED

5. *Financial Showing* : United argues Midwest is seeking authority to construct MMDS stations in 20 markets. Midwest proposes to utilize a $2.1 million line of credit it has obtained from Norwest Bank Minneapolis, N.A. to meet its construction and operating expenses. United submits that the funds required to construct 20 facilities are significantly more than what the bank is committed to lend. United notes that the subject application indicates that its construction costs will be $156,000. Assuming this is the average cost of each of its 20 proposed facilities, the total required is $3,120,000, which is $220,000 than what Midwest has available.[4] Nor can Midwest rely on assets listed in its balance sheet, says United. None is sufficiently liquid to be taken into account for the purpose of assessing Midwest's financial qualifications. Consequently, United contends that Midwest is not financially qualified. United contends further that Midwest is barred by Section 21.31(e) of the Commission's Rules from curing these defects.[5]

6. Midwest contends there is no requirement that an applicant show that it has sufficient funds to construct and operate all the facilities represented by applications that it may have on file with the Commission. Instead, says Midwest, the Commission's Rules require only that an applicant meet the "realistic and prudent" estimated construction and operating expenses for the particular application being reviewed. Therefore, even if operating expenses for one year, rather that the more reasonable three months, were added to the construction cost of $156,000, the total cost would be $186,000, a sum far less than the $2.9 million that United acknowledges to be available to Midwest.[6]

7. Midwest submits in any event, at this time it has only 10 applications, including Denver, which may be selected for grant. Even assuming it were to become the tentative selectee in all 10 markets, Midwest says its total estimated construction and operating costs would not exceed $1,860,000, which again is far less than its $2.9 million line of credit.

8. Finally, says Midwest, even though the foregoing facts dispose of United's allegations, it should be noted that its financial resources have increased markedly since it filed the subject application. It is tendering an amendment to its application showing that the book value of its consolidated assets has risen from $65 million to approximately $170 million and that it has secured a new $2 million revolving line of credit in place of the Norwest Bank line indicated in its application. Midwest says that this information updates rather than alters its financial qualification, and consequently is not subject to the Commission's cut-off rules.

DAETC

9. *Site availability* : DAETC notes that Lookout Mountain, the location of Midwest's proposed transmitter site, is situated in Jefferson County, Colorado, and that in recent years, Jefferson County zoning authorities have been reluctant to allow new telecommunications facilities to be constructed on Lookout Mountain. Very little of Lookout Mountain, says DAETC, is zoned for telecommunications towers. Because of the uncertainly concerning zoning approval. DAETC contends that Midwest can not be considered to have a transmission site available to it.

10. Midwest replies that Section 21.15 of the Commission's Rules provides that an applicant's burden of demonstrating site availability is considered satisfied if it has either secured a lease or a written option to lease a site. Midwest states that it has satisfied its obligation under Section 21.15 because it has acquired a written option to lease its proposed tower site. Midwest also explains that it proposes to locate its transmission antenna on an existing 79 foot tower. Its antenna, which is roughly 4 feet in length, would be side-mounted at approximately the 20 foot level of the tower. The relative insignificance of its proposal makes it very doubtful that it would require rezoning. Furthermore, zoning questions. says Midwest, arise only in those instances in which a local zoning board has made a prior denial of an applicant's request to build the proposed facility. DAETC has neither shown that rezoning would be necessary nor that it would denied. Therefore, Midwest concludes that the addition of a site availability issue is uncalled for.

11. *Interference* : In support of its allegation that Midwest's operation will cause serious and pervasive interference to DAETC's system, DAETC has submitted a computerized interference analysis of Midwest's effect upon DAETC's four registered ITFS receive locations. According to the analysis three of the four sites would be subjected to excessive interference. Furthermore, says DAETC, because grandfathered ITFS systems, including DAETC's, are allowed to interfere with subsequently authorized MMDS systems, Midwest will experience considerable interference over extraordinarily wide portions of its normally protected service area. These areas of interference, says DAETC, are so enormous as to make a viable MMDS system on the E channel group impossible in the Denver area.

12. Midwest calls DAETC's interference allegations technically unsupportable. Midwest relates that in 1983, DAETC was granted a permit to construct its ITFS facilities on Channel Group E. The permit authorized DAETC to transmit from downtown Denver to four receive locations: R1 - Denver International School; R2 - Sheppard of the Valley Lutheran; R3 - Quest Center for Creative Studies and R4 - Escuela Tlateloco (none of which have been built). DAETC's analysis, Midwest observes, indicates that the desired (DAETC) to undesired (Midwest) signal at sites R1, R2 and R3 will be 44.3 dB, 33 dB and 44.8 dB respectively, whereas a 45 dB ratio is required for a prima facie demonstration that the proposed station will be compatable with the facilities that were authorized previously.

13. The analysis, avers Midwest, is defective because DAETC has systematically overestimated the actual strength of the proposed Midwest signal at the three receive sites in question. Midwest explains that it plans to colocate its antenna with the adjacent channel MMDS transmission facilities of Heritage Broadcasting Company of North Carolina. the tentative selectee for the F Group channels.[7] Duplexing these two groups, contends Midwest, will reduce signal strength so that potential interference would occur only at site R2. Harmful interference of site R2 will be eliminated, Midwest says, by changing the orientation of Midwest's directional antenna, (from 104' to 115'). Midwest has therefore has petitioned to amend its application to adopted this new antenna pattern.

14. Finally, Midwest contends that DAETC's allegations raise serious concerns about DAETC's willingness to cooperate with cochannel and adjacent channel MDS operators in the Denver area. Midwest states that the viability of its system will not be threatened if the grandfathered ITFS permittees carry out their obligation to cooperate with prospective co-channel MMDS operators to minimize any interference problems that may arise.

DISCUSSION

15. It appears that Midwest is financially qualified. Section 21.17 of the Commission's Rules requires that an applicant demonstrate that it has the financial resources available to construct and operate the facilities for which it is seeking authority. Midwest's estimate that its total construction and operating costs for one year will be $186,000. is unchallenged. Nor does United deny Midwest's $2 million line of credit. Therefore, it is obvious that Midwest has met the Commission's test for financial fitness, and United's allegations do not require further examination.

16. We also find that DAETC has failed to raise any question concerning Midwest's proposal that would require further examination. DAETC's allegation that Midwest, because of zoning considerations, has not demonstrated that it has secured a site for its transmitter is not persuasive. The Commission has traditionally held that while an applicant must have reasonable assurance of obtaining local zoning approval for its antenna proposal, there is a presumption that zoning approval will be granted. The presumption, however, may be rebutted by a "reasonable showing" that the applicant cannot obtain zoning approval. DAETC has failed to present a "reasonable showing" that zoning restrictions will preclude Midwest from constructing its MMDS facility. *See, e. g., Northbanke Corp.*, 46 Rad.Reg. (P&F) 2d 453, 457 (1979). Instead DAETC, in its opposition to Midwest's petition to amend, has tendered a letter from a representative of the Jefferson County Planning and Zoning Department stating that any effort to mount a MMDS transmitter antenna on an existing tower at Lookout Mountain will require rezoning, but refusing to declare that such an application would not be approved.

17. Midwest's modified engineering proposal and accompanying interference analyses allay the issue of potential interference. Midwest has demonstrated that by colocating its transmitter with that of the other tentative selectee it will avoid subjecting two of DAETC's three threatened authorized receive sites to harmful interference. It has also adequately demonstrated that it will avoid interfering with DAETC's third receive site by altering the orientation of Midwest's antenna. Midwest also states that it stands ready to employ other techniques for reducing interference to DAETC if it becomes necessary. We believe Midwest's application, as amended, should be granted. We expect both DAETC and Midwest, as Commission licensees, to exercise their best efforts to ensure that interference does not result. On the basis of the pleadings before us, there appears to be no reason

why both operations would not be compatable. This finding is equally true of DAETC's other interference allegation, that existing ITFS systems may interfere with subsequently authorized MMDS systems, which will cause Midwest pervasive destructive interference from DAETC over extraordinarily wide portions of Midwest's normally protected service area.

CONCLUSION

18. Neither United nor DAETC has raised any substantial and material question of fact with respect to the qualifications of Midwest. We therefore conclude that Midwest has made an adequate demonstration that it is legally, technically, financially and otherwise qualified to be awarded the construction permit to build an MMDS facility on Channel Group E in Denver, Colorado.

19. Accordingly, IT IS ORDERED, That the petitions to deny filed by United and DAETC ARE DENIED.

20. IT IS FURTHER ORDERED, That the "Opposition to Petition for Leave to Amend" filed by DAETC IS DENIED.

21. IT IS FURTHER ORDERED, That the "Petition for Leave to Amend" filed by Midwest IS GRANTED.

22. IT IS FURTHER ORDERED, That the above-captioned application IS GRANTED.

Federal Communications Commission

Albert Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Report and Order (Gen. Docket No. 80-112), 54 Rad. Reg. (P&F) 2d 107 (1983) (herinafter cited as First MMDS Order).

[2] The E Group channels are: E1-2596 to 2602 MHz, E2-2608 to 2614 MHz, E3-2620 to 2626 MHz and E4-2632 to 2638 MHz. The F Group channels are: F1-2602 to 2608 MHz, F2-2614 to 2620 MHz, F3-2626 to 2632 MHz and F4-2638 to 2644 MHz. Each applicant is permitted by Section 21.902(d)(2) of the Commission's Rules to submit only one application for either all 4 E Group channels or for all 4 F Group channels.

[3] Second Report and Order (Gen. Docket No. 80-112), FCC 84-568, 50 Fed. Reg. 5,983 (1985).

[4] This figure appears to be based on United's apparent mistaken belief that Midwest's available line of credit was $2.9 million rather than the stated $2.1 million. United's error has been carried over into Midwest's arguments. See, paragraphs 6 and 7, *infra*.

[5] It is United's view that any amendment to demonstrate compliance with the Commission's requirements would be major and therefore barred by the cut-off rules.

[6] MMDS applicants are required to demonstrate financial ability to meet operating expenses for one year. *See* First MMDS Order, *supra* at 148 and Public Notice "Common Carrier Services Inforation" (Report No. 96) June 26, 1978.

[7] DAETC and United have also petitioned the Commission to deny Heritage's application (File No. 5501-CM-P-83).

Before the
Federal Communications Commission
Washington, D.C. 20554

TELECOMMUNICATIONS
Application for authority
to provide resale service
between the U.S. and various
overseas points

ERRATUM

Released November 20, 1986

By the Common Carrier Bureau: grants authority to Telecommunications Systems. Inc. to resell services and should be added as an authorized point of communication.

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Common Carrier Bureau Wayne, IN). DA86-233 $

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

CELLULAR ADVANCED
RADIOPHONE File No. 30638-CL-P-096-A-84
SYSTEMS, INC.
For authority to contruct a
Domestic Public Cellular Radio
Telecommunications System in
the Fort Wayne Metropolitan
Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted November 17, 1986; Released November 20,

1. Syndicated Communications,Lt. (Syndicated) filed a Systems, Inc. d/b/a CARS. In the petition Syndicated argues the CARS application did not contain all the required engineering informational showings the Fort Wayne system was filed with the application; the application does requirements: applicant failed to give reasonable assurances of site and finally, that the application may cover less than 75% of the Fort Wayne

2. CARS' application was selected first in the lottery Public Notice, FCC-2955, released March 4, 1986. failure to designate a control point. Pursuant to Section 22.909 (a) (1) there is no requirement to designate a control point in the application.

4. We also find that CARS had reasonable assurances applicant need not have a binding agreement or absolute assurance of the reasonable assurance that its proposed site is available.[1] *See Public Television Inc.*, 59 FCC 2d 1 *Service Inc.*, (Philadelphia) 52 Rad. Reg. 2d 1593 (1983); also, *Advanced Mobile Phone Service*, for cell #2. However, CARS supplied a site availability letter from the listed coordinates. CARS also adequately explained that the antenna existing, however, it had reasonable assurances of access to the proposed tower. We cover 75% of the MSA. However, upon review we have found that the beyond the MSA. The extension of the CGSA into areas outside the MSA is not

5. For the reasons stated above and based upon a careful technically and otherwise qualified to be a Commission licensee. Cellular Advanced Radiophone Systems, Inc. d/b/a CARS, File No. right to any interference protection in any areas outside the Fort Wayne future licensees in adjacent markets and upon providing

7. IT IS FURTHER ORDERED, that the petition to deny

8. This order is issued under Section 0.291 of the reconsideration under Section 1.106 or applications for review under Section 1.115 of order. *See* Section 1.4(b)(2).

Kevin J. Kelley

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOMMUNICATIONS SYSTEMS, INC. File No. I-T-C-86-156

Application for authority to provide resale service between the U.S. and various overseas points

ERRATUM

Released November 20, 1986

By the Common Carrier Bureau:

1. The captioned Order, Authorization and Certificate grants authority to Telecommunications Systems, Inc. to resell services to various overseas points.

2. In paragraph 5, "Canada" was inadvertantly omitted and should be added as an authorized point of communication.

FEDERAL COMMUNICATIONS COMMISSION

James L. Ball
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

CELLULAR ADVANCED
RADIOPHONE SYSTEMS, INC.
d/b/a CARS
File No. 30638-CL-P-096-A-84

For authority to contruct a
Domestic Public Cellular Radio
Telecommunications System in
the Fort Wayne Metropolitan
Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted November 17, 1986; Released November 20, 1986

By the Common Carrier Bureau:

1. Syndicated Communications,Lt. (Syndicated) filed a petition to deny the captioned application of Cellular Advanced Radiophone Systems, Inc. d/b/a CARS. In the petition Syndicated argues the CARS application should be dismissed or designated for hearing because the application did not contain all the required engineering informational showings required by the rules. To wit, no information concerning the control point for the Fort Wayne system was filed with the application; the application does not comply with the Federal Aviation Administration (FAA) notification requirements; applicant failed to give reasonable assurances of site availability (for sites 1,2,3, and 4) or falsely certified their availability and finally, that the application may cover less than 75% of the Fort Wayne Metropolitan Statistical Area (MSA) because of a change in a cell site.

2. CARS' application was selected first in the lottery for the nonwireline frequency block in Fort Wayne. *See*, Public Notice, FCC-2955, released March 4, 1986.

3. We find that CARS' application is not defective for failure to designate a control point. Pursuant to Section 22.909 (a) (1) a cellular system must have at least one control point; however, there is no requirement to designate a control point in the application. *See*, Section 22.913.

4. We also find that CARS had reasonable assurances of site availability at the time it filed its application. An applicant need not have a binding agreement or absolute assurance of the availability of a proposed site but rather must show that it has obtained reasonable assurance that its proposed site is available.[1] *See Alabama Citizens for Responsive Public Television Inc.*, 59 FCC 2d 1 (1976); *Advanced Mobile Phone Service Inc.*, (Philadelphia) 52 Rad. Reg. 2d 1593 (1983); *See also, Advanced Mobile Phone Service, Inc.*, (Kansas City) 54 Rad. Reg. 2d 531 (1983). Syndicated claimed that there was no tower as proposed for cell #2.
However, CARS supplied a site availability letter from the Motorola Corporation as proof of the availability of the site at the listed coordinates. CARS also adequately explained that the antenna for cell site #4 was incorrectly described in the application as existing, however, it had reasonable assurances of access to the proposed tower. We also find that the application complies with our requirements that it cover 75% of the MSA. However, upon review we have found that the applicant's Cellular Geographic Service Area (CGSA) and 39dBu contours extend beyond the MSA. The extension of the CGSA into areas outside the MSA is not permitted. Therefore, the authorization will be conditioned accordingly.

5. For the reasons stated above and based upon a careful review of the application and associated pleadings we find CARS to be legally, technically and otherwise qualified to be a Commission licensee.

6. Accordingly, IT IS ORDERED, That the application of Cellular Advanced Radiophone Systems, Inc. d/b/a CARS, File No. 30638-CL-P-096-A-84, IS GRANTED conditioned on the authorization not including the right to any interference protection in any areas outside the Fort Wayne MSA and is further conditioned upon CARS coordinating with current and future licensees in adjacent markets and upon providing interference-free operations to licensees in those areas.

7. IT IS FURTHER ORDERED, that the petition to deny filed by Syndicated Communications, Ltd., IS DENIED.

8. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

Kevin J. Kelley

Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] CARS has complied with FAA notification requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

TEL-SHARE
TELECOMMUNI-
CATIONS, INC. File No. 31352-CL-P-102-A-84

For a construction permit to
establish a cellular system
operating on frequency Block A
in the Domestic Public Cellular
Radio Telecommunications Service
to serve the Des Moines, Iowa
Metropolitan Statistical Area

ORDER ON FURTHER RECONSIDERATION

Adopted November 4, 1986; Released November 19, 1986

By the Commission: Commissioner Dennis not participating.

1. Tel-Share Telecommunications, Inc. (Tel-Share) has filed a petition seeking reconsideration of our *Order on Reconsideration*, FCC 86-41, released January 24, 1986 (*Order*). Because Tel-Share's petition alleges that the *Order* did not address all of Tel-Share's substantive arguments, Tel-Share's petition is not merely repetitious and will be considered.

Discussion

2. Tel-Share asserts that the petition for reconsideration it filed on October 24, 1985 presented four separate factors, any one of which would eliminate the funding shortage of approximately $140,000 and prove that Tel-Share was financially qualified when it filed its application. First, there was an error in Tel-Share's balance sheet which, when corrected by an attached amendment, would have reduced current liabilities and increased "available net liquid assets" by $142,834. Second, Tel-Share submitted a Statement from its original lender that "Had the bank been aware that we should have specified the larger amount, we would have done so." Third, Tel-Share submitted a new bank letter from a new bank to show Tel-Share's "ongoing financial ability to fund the system's development." Finally, Tel-Share submitted evidence that its cost projections "were at least 10-15 percent higher than necessary."

3. In the *Order*, we described all of the arguments outlined above. However, in denying Tel-Share's petition we only specifically rejected Tel-Share's second and third arguments above, stating that Tel-Share had failed to demonstrate that its original bank letter contained any typographical error and that Tel-Share's new bank letter constituted an impermissible pre-lottery amendment.

4. We herein reject Tel-Share's remaining tendered evidence and arguments. As we stated in the *Order* in rejecting the arguments presented by two other petitioners, "the post-filing clarifications and additional financial evidence offered must be rejected as prohibited amendments." This finding applies equally to Tel-Share's attempt, through prohibited amendments, to correct the asserted mistake in its submitted balance sheet and to discount the cost projections that were presented in its application. Furthermore, even if we were to accept the amendment to Tel-Share's balance sheet, the amendment itself does not provide sufficient detail or proof of liquidity to demonstrate the availability of any net liquid assets. *See Order on Reconsideration*, FCC 86-46, released January 24, 1986. In sum, Tel-Share submitted an admittedly deficient financial showing in its application, and Section 22.918(b) of our rules prohibits the pre-lottery submission of any amendments to correct such deficiency. Our *Order* reached the correct result, and, for the reasons presented above, we must deny Tel-Share's Petition for Reconsideration.

5. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Tel-Share Telecommunications, Inc. on February 21, 1986 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

A.S.D. ANSWER SERVICE, INC.	CC Docket No. 82-587 File No. 23194-CD-P-(01)-82, *et al.*
B.W. COMMUNICATIONS, INC.	CC Docket No. 82-588 File No. 23259-CD-P-(01)-82 *et al.*
P.A.L. COMMUNICATIONS SYSTEMS INC.	CC Docket No. 82-589 File No. 23168-CD-P-(01)-82 *et. al*
VINEYARD COMMUNICATIONS, INC.	CC Docket No. 82-590 File No. 23199-CD-P-(01)-82 *et al.*

For authority to construct new one-way paging stations in the Domestic Public Land Mobile Radio Service on 34 and 43 MHz frequencies at various locations throughout the United States

Memorandum Opinion and Order

Adopted: November 14, 1986; Released: November 21, 1986

By the Commission: Commissioner Quello concurring in the result; Commissioner Dennis not participating.

1. This proceeding involves applications filed by A.S.D. Answer Service, Inc. (ASD), B.W. Communications, Inc. (BW), Vineyard Communications, Inc. (Vineyard), and P.A.L. Communications Systems, Inc. (PAL) (hereinafter referred to collectively as Applicants), for new paging facilities in the Domestic Public Radio Service (DPLMRS). Applicants filed over 600 applications for frequencies in the 35 mHz frequency bands, in approximately 50 market areas. In the Order Designating Applications for Hearing, 47 Fed. Reg. 40896, published September 16, 1982, the Commission found there were serious questions concerning whether Graphic Scanning Corp. (Graphic) is the real party in interest behind Applicants, and whether Graphic and Applicants were candid in their representations to the Commission with respect to their relationship. The Commission designated Applicants' applications for hearing on issues to determine: the relationships between Graphic and the Applicants; whether Graphic is a real party in interest behind Applicants; and whether Applicants and/or Graphic have exhibited a lack of candor or intentionally misrepresented material facts to the Commission.

2. The applications in issue are mutually exclusive with applications filed by Respondents. [1] Graphic and Respondents were made parties. In order to expedite the final resolution of this proceeding, while keeping the complexity of the issues and the number of parties involved to a manageable size, the Commission did not designate the applications filed by Respondents or by Graphic's subsidiary corporations. The Commission provided that the findings and conclusions in this proceeding would be incorporated into the records of any hearing involving Graphic's applications. [2]

3. In an Initial Decision, FCC 85D-3, released January 9, 1985, the ALJ found that Graphic is the real party in interest behind Applicants. and that Applicants and Graphic were lacking in candor and intentionally misrepresented material facts to the Commission. The ALJ concluded that Applicants are not qualified to be Commission licensees and he denied their applications. Exceptions to the Initial Decision were filed by Graphic, ASD, PAL, Vineyard and BW.

4. After exceptions were filed, Graphic, Respondents and Applicants notified the Commission's staff that they had engaged in negotiations aimed at bringing about a settlement of the proceeding. The staff agreed to attend future discussions. The discussions were suspended during the time that there was a proxy fight for control of Graphic but were resumed when the new management (see footnote 6, below) indicated an interest in settlement.

5. Now before the Commission for consideration is a letter filed July 24, 1986 by Graphic, requesting the Commission to approve a settlement of this proceeding. By *Public Notice* released July 25, 1986, Mimeo No. 5985, the Commission invited interested persons to file comments on the proposed settlement. Comments on the proposed settlement were filed on August 4, 1986 by Barry Yampol,[3] Arthur E. Finfer, Robert Slodowitz, [4] Harry J. Pappas. d/b/a California Portophone (Portophone), Pocono Mobile Radio Telephone Company, Inc. (Pocono), AnsweRite Metro Communications, Inc. (AnsweRite), Respondents, and the Separated Trial Staff; and on August 14, 1986 by Mobilfone of Northeastern Pennsylvania, Inc.[5] Replies were filed August 11, 1986, by Graphic, Respondents and Yampol, and August 21, 1986 by Graphic.

6. Graphic requests that the Commission terminate the proceeding by issuing an order vacating the conclusions in the Initial Decision. The findings would be retained but would not apply to Graphic's current management. [6] The findings would apply, however, if former Graphic principals (Yampol, Slodowitz and Finfer) who were active in management at the time of the alleged misconduct were to participate in management of Graphic or own Graphic assets other than through stock ownership. Graphic will dismiss all low band paging applications (approximately 200), and surrender all low band paging construction permits (20) in the ASD markets, and surrender the licenses for its paging system in Portland, Oregon, its 43.66 MHz operation in Houston, Texas, and its 43.46 MHz operation in the Phoenix-Tucson, Arizona market. PAL, Vineyard, BW and ASD will dismiss all of their low band applications and low band construction permits. Graphic, Applicants and Respondents also ask the Commission to approve agreements, under which: Graphic will reimburse Respondents $3 million for litigation expenses; Respondents will not raise objection based on the ASD findings to future Graphic applications; Graphic will forbear from refiling for ASD related low band frequencies for one year; Graphic will withdraw a law suit filed against Respondent MCCA and others, and MCCA will reimburse Graphic $20,000 for litigation expenses; PAL, BW and Vineyard will dismiss their low band paging applications in ASD markets and not refile for such channels for one year; ASD will dismiss its low band applications and not refile for five years; and Graphic will purchase ASD's California paging agency for

$400,000. Graphic will also extinguish certain debts due from ASD and dismiss pending civil actions against ASD. Applicants, Graphic and Respondents agree to the foregoing terms for a resolution of this proceeding.

7. The comments and replies fall into four (4) categories. Graphic, Respondents and AnswerRite support the proposed settlement. Cellular and paging applicants who filed applications which are mutually exclusive with applications which were filed by Graphic oppose the settlement. Graphic's former principals (Yampol, Slodowitz and Finfer) oppose any settlement which does not vacate the Initial Decision or include a Commission review of the Initial Decision. The Separated Trial Staff raises a number of issues which it asserts should be resolved before the Commission approves the settlement agreement and terminates the proceeding.

The Settlement Agreement

8. The ASD hearing was designated primarily to: (1) determine whether Graphic and the Applicants would be qualified licensees who could be relied upon to comply with the Commission's Rules and Regulations and; (2) to deter applicants and licensees from engaging in the activities that were alleged to have occurred. We will approve Graphic's settlement request because we can achieve these goals and reap additional public interest benefits. With regard to the first goal, the Applicants are dismissing all of their applications – their qualifications are no longer of concern. Graphic has undergone a change in management. Those who participated in the events that were the subject of the hearing no longer manage Graphic. There have been no allegations that the individuals who are now in control of Graphic have engaged in any misconduct or in any way lack the qualifications to be licensees.

9. The terms of the settlement provide a clear message that the conduct that was alleged to have taken place will not be tolerated. First, dismissal by the Applicants of all their low band paging applications and by Graphic of all its low band applications assures that, if wrongdoing has occurred, the wrongdoers have not benefited from their conduct. Also, Graphic's surrender of construction permits and three licenses represents a substantial setback for the company. If this proceeding were not settled and instead wound its way through the administrative and appellate processes, it is unlikely that the resolution would be very different than that provided by the terms of the settlement – again assuming that the Initial Decision is affirmed. Certainly, if it were ultimately concluded that wrongdoing did occur, Graphic's management changes would be considered when determining an appropriate resolution. See Teleprompter Cable Systems, Inc., 40 FCC 2d 1027 (1973). We are satisfied that the settlement provisions will deter Graphic and others from engaging in the kinds of activities at issue in this instance.

10. There are additional benefits to be derived from settlement. It has been a long and expensive proceeding for the parties and this agency. Settlement obviates the necessity of the Commission having to rule on the exceptions that were filed and issue a final decision. An appeal would undoubtedly follow. Moreover, in the event that the final decision were adverse to Graphic, the Commission would have to initiate new hearing proceedings if action against Graphic's existing licenses or permits were deemed appropriate. Graphic's low band paging applications, which are being dismissed under the settlement, and the authorizations which are being surrendered, would have to be designated for hearings, and more time and agency resources would be consumed.

11. The pendency of this proceeding has created uncertainty in the industry, where Graphic is a major participant, and to the public that is served by that industry. The adverse impact attributable to the uncertainty is particularly significant in the rapidly developing mobile services industry where new technologies and competition can bring the public better quality and more economical service. Removal of the "cloud" that has existed over Graphic will remove an impediment to developing these services. [7] It will also provide Graphic's current customers with the stability they need to make plans for the future. Moreover, dismissal by Graphic and Applicants of low band applications and construction permits will allow other applicants to provide new paging services. For example, AnsweRite will immediately be able to initiate new service in Florida where it was a lottery runner-up to BW. Thus, we can approve the agreement and vacate the ALJ's conclusions because the overall result satisfies our overall enforcement objectives, while at the same time conserves agency resources, advances the growth of the industry, and results in improved service to the public.

12. Graphic's character was in issue in this proceeding and was thoroughly examined. While we are vacating the ALJ's adverse conclusions, we have reviewed the record and conclude that in view of the change in Graphic's management and the dismissal and surrender of applications, permits and licenses, there is no cause to raise character issues in future proceedings based on the ASD record. The totality of these circumstances do not, in our view, leave questions about Graphic's character which rise to the level necessary to disqualify the company from continuing as a Commission licensee. Since Graphic cannot be disqualified as a licensee on the basis of this record, we will not consider the ASD allegations in future proceedings involving Graphic for any purpose, including comparative evaluations, unless a change in Graphic's management makes it necessary to revisit ASD. In Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986), we concluded that while character could continue to be important as a "qualification" matter, it would not be considered for "comparative" purposes in broadcast proceedings. Although we there noted that the policies generally underlying character in the broadcast context are different from those raised in common carrier context, 102 FCC 2d at 1202, fn. 42, we see no reason to apply a different standard concerning comparative evaluations in non-broadcast proceedings. Therefore, even in the absence of this settlement, we would not be inclined to consider ASD related allegations for possible comparative impact.

Comments by Mutually Exclusive Cellular and Paging Applicants and the Trial Staff

13. Pocono has an application for paging facilities on 454.075 MHz, which is mutually exclusive with an application filed by a Graphic subsidiary. Portaphone and Mobilfone are cellular applicants in markets where construction permits were granted to Graphic subsidiaries. Those construction permits were conditioned on the outcome of the ASD proceeding.

. These applicants argue that they are prejudiced by Graphic's proposal because the adverse findings in the ASD record are relevant to their proceedings. Portaphone

citing FCC v. WOKO, Inc., 329 U.S. 223 (1946), also argues that Graphic cannot purge itself of the taint of the ASD proceeding by removing officers; that the integrity of the Commission's processes requires that a penalty be imposed; and that Graphic should be required to surrender applications, licenses, and permits, beyond those involved in the ASD markets.

15. Mobilfone has an appeal pending of the cellular grant. [8] It argues that because its appeal is a restricted adjudicatory proceeding, the settlement negotiations were improper ex *parte* contacts and that it was denied its due process right of equal representation. It also argues that the denial of its right to participate is not cured by offering it an opportunity to comment on the settlement. It asserts that in conditioning the grants, the Commission deferred its Section 309 responsibilities to resolve the issues concerning Graphic's fitness to be a licensee and cannot evade these responsibilities by accepting the proposed settlement. Mobilfone asserts that the Commission must either affirm the ALJ's decision or issue its own decision predicated on the exceptions filed by the parties.

16. The Trial Staff asserts that this proceeding involves Graphic's conduct in the Public Mobile Radio Service and that any disposition should address all of Graphic's applications and permits in that service. It also argues that the Commission should address the issue of what procedures are required to protect the rights of mutually exclusive applicants to challenge permits and licenses which have been granted subject to an ASD condition.

17. We have already concluded that the terms of the settlement provide a clear deterrent and are consistent with our regulatory responsibilities. Graphic's competitors have filed applications in other mobile services that are mutually exclusive with applications filed by Graphic and would clearly prefer that the proceeding not be settled in the hope that a Commission decision would be adverse to Graphic and provide them with an advantage in their proceedings. Moreover, if Graphic were eventually disqualified as a licensee, or surrendered more authorizations, the competitors would reap additional benefits. We are not persuaded that the competitors have any rights to assert in this area. There is no reason to believe that Graphic, under its new management, will fail to meet its licensee obligations. The competitors have not challenged the qualifications of the new management. Their protestations, while understandable, do not provide a basis for denying the agreement. They will have to compete with Graphic and the public will be the ultimate beneficiary. Their desire to prolong this proceeding or use the findings in their own proceedings is not in the public interest because it would result in the expenditure of time and resources and deprive the public, the parties and the Commission of the benefits of the settlement. By placing conditions on grants to Graphic and its subsidiaries and by indicating that the ASD findings and conclusions would be incorporated into other, future proceedings, we set up a procedure designed to keep the ASD hearing within manageable bounds and allow for the processing of other applications. We did not, however, create rights that can be asserted to defeat a settlement. We must have broad discretion and latitude in applying our procedures and resolving matters such as ASD if we are to be an effective, efficient agency capable of meeting its responsibilities. Our approval of this settlement is an example of our willingness to consider innovative resolutions of controversies.

18. Mobilfone's argument that the settlement is tainted by ex *parte* communications, is without merit. The Commissions's ex *parte* procedures do not preclude discussions pertaining to the resolution of one proceeding, merely because those discussions could have a collateral effect on a restricted proceeding. In adopting the ex *parte* rules the Commission recognized that discussions in one proceeding could affect other proceedings. The Commission held that:

> [t]he rules are not intended to interfere with the participation by parties to a restricted proceeding in other proceedings . . . before the Commission. Nor are they intended to bar normal communication between decisionmaking personnel and attorneys (or other persons) who are pursuing the interests of . . . clients . . . in other restricted proceedings. Rules Governing *Ex Parte* Communications in Hearing Proceedings, 1 FCC 2d 49, 57(1965).

Thus, the ex *parte* rules do not bar discussions looking toward a legitimate resolution of this proceeding and the settlement is not tainted because of the restricted nature of Mobilfone's appeal. [9]

Comments by Graphic's Former Principals

19. Yampol was Chairman of Graphic from its incorporation in 1971 until May 1986. Slodowitz was Vice President of Graphic for Corporate and Financial Development from June 1975 until September 1985. Finfer was Vice-President for Marketing of Graphic's Paging Division from 1981 until July 1985. They object to that part of the proposed settlement which would retain the ALJ's findings [10] but not apply them to Graphic unless these former principals participate in Graphic's management or the ownership of Graphic's assets other than through their ownership of Graphic's stock. They assert that this provision of the settlement unfairly implicates them in the alleged misconduct.

20. Yampol argues that the settlement makes an adverse determination on his qualifications to be a licensee, which cannot be adopted by the Commission without a hearing. He asserts that in *Peoples Broadcasting Corp.*, 68 FCC 2d 1570 (1978), the Commission held that an applicant was entitled to a hearing on his qualifications even though he had been implicated in misconduct in prior proceedings. [11] Yampol argues that he would be prejudiced by unreviewed findings and that they should be vacated if the proceeding is mooted by settlement. He asserts that vacating unreviewed decisions is standard practice in the federal courts and the procedure followed in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *A. L. Mechling Barge Lines v. United States*, 368 U.S. 324, 329 (1961); and *Boston Community Media Committee v. FCC*, 509 F.2d 516, 517 (D.C. Cir. 1975); and by the Commission in *Constance J. Wodlinger*, FCC 85-335, released July10, 1985.[12] Yampol argues that the unresolved findings will unfairly inhibit his particpation in any economic endeavor where the findings could be raised against him; [13] inject the Commission into a dispute between him and Graphic's Board of Directors over the ownership of certain Graphic assets, including non-regulated assets; [14] and interfere with the rights of shareholders to elect him to Graphic's management.

21. This settlement is premised, in part, on the creation of a new Graphic Board of Directors. Nevertheless, we have emphasized (and will now repeat) that we are drawing no conclusions about the acts or omissions of Graphic or its principals. The findings (not the "Ultimate Findings and Conclusions") [15] are being retained. The hearing lasted sixty days with over 50 witnesses compiling 12,000 pages of testimony. We do not want to have to recompile this record if Yampol, Slodowitz or Finfer were to regain control of Graphic or seek to be licensees elsewhere and it became necessary to evaluate their qualifications. We do not see any impediment to our using the findings with respect to any future matters involving those individuals.[16] Yampol, Slodowitz and Finfer knew that the hearing involved inquiry into their conduct at Graphic. As witnesses, they had the opportunity to be personally represented by counsel. They did not seek to intervene. The Exceptions filed by Graphic (before the change in management) do not quarrel with the findings[17] and Yampol, Slodowitz and Finfer, in opposing the proposed settlement have failed to specify any deficiencies in the ALJ's findings. The parties disputed the ALJ's conclusions that flowed from the findings and we are vacating the conclusions. Moreover, we have reviewed the Exceptions and determined that there are no material disputes over the ALJ's Findings of Fact. We, therefore, affirm those findings. See Section 1.277(a) of the Rules.

22. To the extent that these principals are unhappy with the settlement because it fails to exonerate them (nor does it find them culpable), we can be of no assistance. We do not conduct hearings unless they are necessary to our regulatory mandate. Here we can meet that mandate without concluding the hearing. If it becomes necessary to assess the impact of the ASD findings on the qualifications of former Graphic principals, those principals will certainly be entitled to "their day in court" and will be able to present their contentions. One former principal has already filed a new application and he will be entitled to hearing before the ASD findings could be relied on with respect to his qualifications.

23. We see no reason, however, to delay resolution of this larger proceeding in order to address that principal's qualifications. These principals are in a dispute with the new Board of Directors that was elected by the stockholders. Those same stockholders can reinstate the former board if that is their wish. The Commission is not taking sides. We are merely ruling on a settlement proposal from Graphic and other parties. The individual interests of former board members are not relevant to the disposition of the settlement proposal.

Intervention

24. Yampol and Slodowitz request leave to intervene asserting that they will be adversely affected by the proposed settlement. Yampol argues that he was not mentioned in the designation order, was not a party, was not represented by counsel at the evidentiary hearing, and that no conclusions were drawn concerning his individual qualifications to be a licensee. Yampol alleges that he assumed his interests would be protected by Graphic's counsel and that there was no need for him to intervene until he became aware of the settlement proposal.

25. As officers of Graphic during the period in issue, Yampol and Slodowitz figure prominently in the Initial Decision. They testified extensively during the hearing. Since the adverse conclusions are being dismissed, any claimed prejudice must flow from the record and findings. Yampol and Slodowitz were aware of the record and the ALJ's findings, and it was incumbent upon them to assert any claim of a right to intervene in a timely manner. They have not demonstrated that recent events have sparked rights that did not exist previously. Nor have they argued that the findings are incomplete or inaccurate. Having failed to intervene in a timely fashion, they cannot now intervene claiming prejudice based on those findings. *San Fernando Broadcasting Co.*, 12 FCC 2d 279 (Rev. Bd. 1968). Moreover, Slodowitz and Yampol have not shown how they would be able to assist in resolution of the issues if intervention were permitted. Nor have they demonstrated harm from denial of their intervention requests. We have not limited the arguments they could raise in opposition to the agreement and we have considered all the arguments raised. If it becomes necessary to determine the qualifications of Yampol or Slodowitz to be licensees they will have ample opportunity to be represented and present their contentions. They have not demonstrated how they are being prejudiced by not getting that opportunity in the context of this proceeding.

Conclusion

26. For all the reasons set forth above we are approving the agreement as submitted with one exception: Yampol has objected to language in Graphic's settlement proposal that the findings of fact could be relevant if Yampol were to own Graphic assets other than through stock ownership. Yampol argues that such language would constitute an intrusion into non-regulated corporate activities. We see no reason for that provision and the settlement proposal is not approved to the extent it applies to non-regulated assets.

27. ACCORDINGLY, IT IS ORDERED, That the request for approval of settlement agreement, filed July 24, 1986 by Graphic Scanning Corporation IS GRANTED to the extent indicated herein.

28. IT IS FURTHER ORDERED, That the ALJ's Ultimate Findings and Conclusions ARE VACATED and the Findings of Fact ARE AFFIRMED.

29. IT IS FURTHER ORDERED, That the Motion for Leave to Supplement Comments filed September 26, 1986 by Mobilfone of Northeastern Pennsylvania, Inc. IS GRANTED and that the Supplement to Comments filed September 26, 1986 by Mobilfone of Northeastern Pennsylvania, Inc. IS ACCEPTED.

30. IT IS FURTHER ORDERED, That the Petition for Leave to Intervene filed July 24, 1986 by Barry Yampol, and the request for intervention in a letter dated August 1, 1986 from Robert Slodowitz ARE DENIED.

31. IT IS FURTHER ORDERED, That the Petition for Acceptance of Affidavit *nunc pro tunc*, filed August 4, 1986 by Barry Yampol IS DISMISSED AS MOOT.

32. IT IS FURTHER ORDERED, That the Request for Oral Argument filed August 27, 1986 by Barry Yampol IS DENIED.

33. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Respondents are radio common carriers who compete with Graphic and are jointly represented by liaison counsel.

[2] In cellular and other licensing proceedings the Commission deferred action on allegations concerning Graphic's qualifications based on the ASD proceeding. The ALJs were directed to "condition any award to take account of any action the Commission may take." in the ASD proceeding. Advanced Mobile Phone Services, FCC 82-452, released November 1, 1982.

[3] On July 24, 1986, Yampol filed a Petition for Leave to Intervene. Oppositions were filed July 29, 1986 by Graphic, and July 30, 1986 by Respondents. The July24 petition was not supported by Yampol's affidavit. On August 4, 1986, Yampol filed a supporting affidavit with a petition for acceptance of the affidavit nunc *pro tunc*. On August 6, 1986 Graphic filed an opposition to the petition for acceptance of Yampol's affidavit and on August 13, 1986 Yampol filed a Reply. On August 27, 1986 Yampol requested oral argument. Graphic filed an Opposition on September 13, 1986 and Yampol filed a Reply on September 15, 1986. Yampol has not established that oral argument will facilitate the resolution of this proceeding and his request will be denied.

[4] Slodowitz's pleading is in the form of a letter, dated August 1, 1986. Slodowitz also asks to be allowed to intervene. On August 7, 1986, Graphic filed an Opposition to Slodowitz's request for intervention.

[5] On September 26, 1986 Mobilfone filed a Motion for Leave to Supplement Comments and a Supplement to Comments. Graphic filed an opposition on October 1, 1986.

[6] Subsequent to the release of the Initial Decision, Graphic's shareholders elected a new Board of Directors. None of Graphic's principals at the time of the alleged misconduct are members of the current Board of Directors or active in Graphic's management (except for one Board Member who was not involved in the alleged abuses). Barry Yampol, Graphic's former Chairman, still owns approximately 17% of Graphic's stock.

[7] See Teleprompter Cable Systems, Inc., 40 FCC 2d 1027, 1034-35 (1973) where the Commission recognized that it was in the public interest to allow a leader in a new industry to offer new services after stockholders removed the corporation's President who had been convicted of criminal conduct.

[8] Mobilfone of Northeastern Pennsylvania, Inc.v. FCC, No. 85-1173 (D.C. Cir.).

[9] Moreover, if the Commission had ruled on the exceptions and issued a decision, it could have placed limitations on the use of any adverse conlusions without having had any input from Mobilfone. Here, Mobilfone was granted a greater right to participate than if the proceeding had been resolved by decision.

[10] Finfer objects to deleting the ALJ's conclusion that he was not privy to the undisclosed matters and events which were the basis of the ALJ's adverse findings.

[11] Yampol also cites WDUL Television Corp., 33 FCC 854 (1962) where the Commission vacated a finding that an applicant was not qualified to be a licensee because an issue had not been designated concerning the applicant's qualifications.

[12] In Wodlinger the Commission vacated an Initial Decision to delete adverse findings concerning the conduct of applicants' attorney, after the proceeding was terminated by settlement without a review of the ALJ's findings.

[13] Yampol argues that the adverse effect of the findings may not be fully visible because he may unknowingly be denied investment opportunities under the theory that the ASD finding could impair his ability to participate in business ventures.

[14] Citing GTE Service Corp.v. FCC, 474 F.2d 724 (2d Cir. 1973), Yampol asserts that the Commission lacks authority to contest his ownership of non-regulated assets.

[15] Yampol also argues that it is not clear exactly what findings are to be preserved because the ALJ had a section of the Initial Decision entitled "Ultimate Findings and Conclusions."

[16] They would, however, be entitled to challenge the significance and weight of the ALJ's findings. See Peoples Broadcasting Corp., supra.

[17] In its March 9, 1985 Exceptions Graphic states: " . . . the Findings of Fact with respect to real party in interest are a neutral recitation of the evidence. . ."

Before the
Federal Communications Commission
Washington, D.C. 20554

MM DOCKET NO. 85-288

AGAPE BROADCASTING FOUNDATION, INC. Dallas, Texas	File No. BRED-830401BV
For Renewal of License for Radio Station KNON-FM	
and	
CRISWELL CENTER FOR BIBLICAL STUDIES Dallas, Texas	File No. BPED-830630AF
For Construction Permit for a New Noncommercial Educational FM Station	

Appearances

Samuel J. Buffone and *John P. Crigler*[1] on behalf of Agape Broadcasting Foundation, Inc.; *John H. Midlen, Jr.* on behalf of Criswell Center for Biblical Studies; and *Pauleue Laden* and *Larry Miller* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE

WALTER C. MILLER

Issued: November 7, 1986; Released: November 21, 1986

Introduction

1. Two mutually-exclusive noncommercial educational applicants seek authority to operate an FM station on Channel 215C, 90.9 MHz in Dallas, Texas. Agape Foundation, Inc. (Agape) seeks to have the license for KNON-FM renewed. It would operate at 32 degrees 45'52"N., 96 degrees 52'06"W with an ERP of 9.6 kW at 146 meters above average terrain.

2. Criswell Center for Biblical Studies (Criswell) proposes to broadcast from the Cedar Hill antenna farm at 32 degrees 35'23"N., 96 degrees 58'10" with an ERP of 100 kW at 483 meters above average terrain.

3. The Commission designated this case for hearing on October 7, 1985 (50 F.R. 41399 published October 10, 1985). After the interlocutory pleading cycle had run its course,[2] the following issues remained for resolution:[3]

1. To determine whether or not, in light of Agape's failure to commence operation with Station KNON for over five years, the applicant is qualified to remain a Commission licensee.
2. To determine whether between August 1983 and April 1985 Agape falsified the KNON logs, and if so, what effect such falsification has on its basic qualifications to be a Commission licensee.
3. To determine whether Agape has made misrepresentations to or has lacked candor with the Commission in response to an FCC Official Notice of Violation and other FCC correspondence.
4. To determine whether Agape has violated 47 CFR 73.506(a)(3), 73.211(a) and 73.1410(a)-(f), and if so, the nature and extent of such violations, and whether Agape can be depended upon to be a responsible operator of a broadcast facility.
5. To determine whether the Association of Community Organizations for Reform Now (ACORN) is a real-party- in-interest to Agape's application (BRED-830501BV), and if so, whether Agape has misrepresented to, or lacked candor with the Commission about the ownership structure of the applicant.
6. To determine whether or not a share-time arrangement between the applicants would result in the most effective use of the channel(s) and thus better serve the public interest, and, if so, the terms and conditions thereof.
7. To determine the number of other reserved-channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby.
8. To determine the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants, or whether other factors in the record demonstrate that one applicant will provide a superior educational broadcast service.[3]
9. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications, if any, should be granted.

On added Issues 2-5 *supra*., the burden of proceeding was placed on Criswell, while the burden of proof remained on Agape.

4. We held a prehearing conference on January 30, 1986, and a further prehearing conference on February 27, 1986. The Phase I evidentiary admission session was held on February 11, 1986, and the Phase II evidentiary admission session on May 23, 1986. We held the Phase I hearings on April 28 and 29, 1986, and the Phase II hearings on June 23-27, 1986. The evidentiary record was closed on June 27, 1986.

5. On June 16, 1986, Agape, Criswell and the Mass Media Bureau filed their Phase I Proposed Findings of Fact and Conclusions of Law. Agape and Criswell filed Phase I Reply Findings on June 23, 1986. Agape, Criswell and the Mass Media Bureau filed their Phase II Proposed Findings of Fact on September 9, 1986, and Criswell and Agape filed Phase II Replies on September 19, 1986.

Issue 1: Agape's Failure to Operate

6. When the Chief, Audio Services Division designated this case for hearing, he was particularly concerned about Agape's failure to operate KNON for over a five year period. See 50 F.R. 41399, published October 10, 1985, at paras. 2-4. He said, "...since Agape has failed to put KNON on the air for over five years, this failure should be considered in evaluating Agape's qualifications vis-a-vis the mutually exclusive construction permit applicants."

7. Obviously, the just-quoted language could be construed as calling for a basic qualifying inquiry; i.e., an inquiry to determine whether Agape remains a *basically*

qualified applicant to be a Commission licensee in spite of its past failure to operate. On the other hand, Agape argued that the Chief's language should be construed as being *comparative* only. The Presiding Officer ruled that the following issue is a basic qualifying issue (See FCC 85M-4724, released December 2, 1985):

> "1. To determine whether or not, in light of Agape's failure to commence operation with Station KNON for over five years, the applicant is qualified to remain a Commission licensee."

Both the burden of proceeding and the burden of proof was placed on Agape to justify its going silent and remaining silent for such an excessive period of time.

8. Apparently, Agape operated KNON's predecessor (KCHU-FM) until on or about September 16, 1977.[4] See 51 F.R. 41399 *supra*., para. 2. The Commission was led to believe that the station went silent because a storm had destroyed KCHU-FM's transmission tower. However, that turned out not to be the case. KNON went dark because its tower was repossessed, and ownership thereof was transferred to another party. Previously Agape had leased the land where the tower was situated but owned the tower itself. In addition Collins Radio Corporation repossessed some of the broadcast equipment; Agape had lost the right to occupy its former studios; and somebody had gutted the remaining broadcast equipment located at the studios. In brief KCHU went silent because of a financial disaster and neglect.

9. Nothing was done about the situation until late March 1978. Then Agape entered into a contract with AM/FM Incorporated (AM/FM). AM/FM, a non-profit corporation, was to assist Agape to return to the air. In furtherance of this agreement, Joseph Fox, AM/FM's operation manager, became KNON's station manager. However, Fox was AM/FM's sole staff member, and since AM/FM also had consulting agreements with an educational FM applicant in Little Rock, Arkansas (KHBF), and with an educational FM permittee in Tampa, Florida (WMNF) he also provided time and services to these two other stations as well. Thus, by the very terms of the contract, it is clear that Agape felt no sense of urgency whatsoever when it came to getting KNON back on the air.[5]

10. Of course when Fox arrived in March 1978 the station was already off the air. Fox doesn't know when KNON went off the air or why it went off the air. But he believes that it didn't go off the air more than 12 months before he arrived (March 1977), and he was told it went off the air for financial reasons.[6] Since Agape's tower, antenna and much of its equipment had been repossessed or stolen by the time Fox arrived, he first concentrated on what he perceived to be the major difficulty in putting KNON back on the air, finding a suitable tower.

11. First, and throughout 1978, Fox looked into returning to the former KNON tower. That proved technically infeasible. Next he pursued the possibility of building or leasing a tower adjacent to KNON's former tower. However, he says he was unable to obtain such a lease. [7] Fox says he also unsuccessfully pursued the possibility of using various other transmitter sites in the Dallas area.

12. In hindsight Fox believes that if he had been able to locate a suitable site there was sufficient money available to put KNON back on the air.[8] He so believes because his employer, AM/FM had a foundation grant of $36,000 and a bank line of credit of $10,000 which it could use at any of the three stations involved. However, AM/FM never indicated that it was willing to allocate any or all of those funds to Agape at the expense of the Little Rock and Tampa projects, and apparently it never did so.

13. Although Fox had never formally notified the Commission that KNON was off the air[9] he did so informally on at least two occasions. On April 30, 1978, he reported member changes in the Agape Board of Directors. At two places in that ownership report he stated that KNON was off the air. Later he came to know that starting January 1, 1979, educational FM stations had to operate 36 hours per week minimum. So, on December 27, 1978, Fox notified the Commission that KNON was off the air, and therefore would be unable to meet its 36 hour minimum.

14. The Commission responded on February 2, 1979. It sent Fox a telegram that authorized KNON to remain silent until April 30, 1979, provided that Agape applied to operate from a new site during the interim. On April 30, 1979, Agape applied to move to a new transmitter site and remain at 100 kilowatts. Fox interpreted the Commission's telegram as meaning that KNON could remain silent without seeking further authority until the Commission acted on its April 30, 1979 application.

15. Joseph Fox was KNON's station manager from March 1978 until September 1979 when he left AM/FM. During his tenure Agape turned down a chance to return to the air immediately. Criswell (Agape's opponent) approached Fox with a plan. Criswell offered to swap frequencies with Agape, and to donate some equipment to Agape so that KNON could go back on the air immediately. Agape turned the offer down.

16. While the April 30, 1979 application was pending, Agape began exploring the feasibility of broadcasting at reduced power. [10] And on May 26, 1982, Agape filed an application to operate at 9.6 kilowatts from a transmitter located at Chalk Hill in Dallas. Later, when Agape filed its renewal on March 28, 1983, it specified a 10 kilowatt operation. On April 21, 1983, the Commission issued Agape a construction permit authorizing a 9.6 kilowatt operation from the Chalk Hill site, and on July 7, 1984, it renewed Agape's 10 kW license until August 1, 1990.

17. On July 29, 1983, Agape requested program test authority for its 9.6 kilowatt proposal. In so doing it represented that station construction was completed. However, this representation proved to be inaccurate; i.e., KNON erred when it notified the Commission that its transmitter was "fully operational." Later, Agape represented that it had brought its transmitter to an operational level on December 11, 1983, and had started broadcasting at 9.6 kilowatts on December 14, 1983. However, this operation was short-lived. Shortly thereafter KNON went silent because of "severe and unusual weather conditions,"[11] namely, ice on its antenna.

18. On January 30, 1985, the Commission granted KNON special temporary authority to operate at further reduced facilities through March 1, 1985. By this time it was obvious that even at the low power of 9.6 kilowatts, Agape was employing a substandard transmitter. On May 24, 1985, Agape notified the Commission that a new authorized transmitter had been installed. KNON is now on the air.

19. The Commission's allegation (Findings 6-7 *supra*.) that Agape failed to operate KNON over a *five* year period is too generous. The record shows that KNON was off the air for over *six* years; i.e., from September 1977 until December 14, 1983. And there were other factors besides engineering and lack of finances that contributed

to that lengthy silent period. First there were organizational difficulties. The Board of Directors underwent almost a total transition between 1979 and 1981. Fund-raising was sporadic, and there was a conflict within Agape's ranks. One of Agape's members, Jerry Brown, tried to take over the station. His group disrupted the station's activities, and broke up its meetings. The police had to be called to restore order. Agape ultimately terminated Jerry Brown as station manager, but he was suspected of having stolen station documents (including FCC correspondence), and was apparently responsible for the loss of certain broadcast equipment. Agape admits that it took at least six to seven months to clear up the disruption Brown caused. The "Brown" revolution occurred during 1982.

20. *Issue 1: Intermediate Facts*. Based on the foregoing (Findings 6-19 *supra*.) certain intermediate facts on Issue 1 are warranted. Agape failed to put KNON on the air for over a six year period. This renders it unfit to be a Commission licensee. Its inordinate record of nonperformance is completely of its own making.

21. Agape went off the air in September 1977 because it was financially unable to stay in operation. Its tower site was repossessed. It lost its studio. Collins Radio repossessed some of its broadcast equipment. In addition, it negligently allowed someone to gut the remainder of the equipment located at the studios. This negligence and lack of fiscal responsibility worked to the detriment of the public interest.

22. Not only did Agape lack the financial resources to stay on the air, it also lacked the human resources. It didn't have the experienced personnel to operate the station. In fact, in March 1978, when it finally decided to try to resume operation it had to seek the outside assistance of the AM/FM Corporation. They had to rely on AM/FM's Joseph Fox's expertise to try and get them on the road back.

23. Moreover, and during the six years Agape was in a state of financial disrepair. it showed a marked inability to recoup. Its fund-raising efforts were both sporadic and ineffectual. At one point it was even reduced to having its members prepare and sell lunches at the station's offices to try and raise funds (Tr. 532).

24. During this six years of voluntary silence Agape also showed the lack of desire to get back on the air. It was subjected to internal bickering. It had to be reorganized. A dissident group, led by Jerry Brown, tried to take over the station. Stated another way, Agape's management showed no sense of public urgency to return to the air.

25. When Agape finally got its act in order, and decided to resume broadcasting. it found that it was only financially equipped to handle a low-power operation. It had to settle for a 9.6 kW proposal instead of its original 100 kW operation. Even then it employed a substandard used transmitter, and had to go off the air periodically. It really displayed no signs of public responsibility until the late spring of 1985.

26. Since Agape has failed to serve the public for over a six year period, since that failure is due to Agape's own inadequacies, and since, even up to the date this case was designated for hearing. Agape failed to get its act in order, the finding is in order that Agape is not qualified to remain a Commission licensee. It has failed to justify remaining silent for such an excessive period of time. Moreover, and following the HDO's mandate (Findings 6 *supra*.), Agape's failure is especially egregious when you consider that there still remains a mutually-exclusive application (Criswell) who is not burdened with such a sad record of non-performance.

Issues 2-4: False Logging, Misrepresentations and Rules Violations

27. Under Issue 2 we must determine whether Agape falsified the KNON logs between August 1983 and April 1985. Under Issue 3 we must find out if Agape misrepresented facts to or lacked candor with the Commission when it responded to a Notice of Violation the Commission sent it on September 9, 1983. Under Issue 4 we must determine whether Agape broadcast at minimum and maximum output parameters and whether it complied with the Commission's remote control operating rules. Because these three issues are interwoven the following interrelated findings of fact are in order.

28. *Background*. As previously noted Agape asked for program test authority for KNON's 9.6 kW proposal on July 29, 1983. But it was not able to put its transmitter on an operational level until December 14, 1983. Even after that; i.e., between December 1983 and April 1985 there were numerous occasions when KNON had to operate at reduced power because of its deficient transmitter. See Findings 17-18 *supra*.

29. When KNON ostensibly went on the air in July 1983 it was immediately forced ro broadcast at substantially reduced power. Because of technical problems with the second-hand ITA main transmitter it was operating off a "Gates" driver. The "Gates" driver was only capable of delivering 250 to 275 watts power, substantially less than the 9,600 watts authorized. Finally, on December 14, 1983, Agape got its used ITA transmitter operational. But this condition was short-lived. Thereafter, and .on numerous occasions between December 1983 and April 1985, Agape was forced to broadcast at a power of 160 to 250 watts.[12] In fact, the situation wasn't really resolved until the Spring of 1985 when Agape installed a "Continental" transmitter.

30. Most of KNON's equipment was used. Before it could go back on the air in July 1983, Agape had to have a remote control unit. So it borrowed a very old "Marti" from another station. At first they calibrated the "Marti" to read the ITA transmitter. But later they recalibrated it to take readings from the "Gates" driver from which KNON was broadcasting. Still later, in December 1983, when the ITA transmitter ostensibly became operational,[13] KNON personnel recalibrated the unit to take readings from the ITA. After that, whenever it was necessary to operate off the "Gates" driver, it wasn't possible to obtain readings at the station by using the remote control unit. However, KNON's management wasn't particularly concerned about this because the station was then operating so far below power that there was no real reason to take power readings. Eventually, in April 1985, Agape replaced the Marti control unit.

31. *The Violation Notice*. On September 9, 1983, the Commission issued a Notice of Violation to KNON. There they pointed out that KNON's transmitter couldn't meet the authorized power requirements, that the station's log entries didn't appear to reflect actual readings, and that KNON had previously (on July 29, 1983) told the Commission it had completed construction.

32. At that time Louis Sartor was KNON's station manager. He replied to the Commission's notice on October 5, 1983 and again on December 19, 1983. Sartor said

that he had told the Commission that KNON had completed construction because his volunteer engineer, Charles Staples, had told him that this was so[14] However, said Sartor, when the transmitter was turned on it didn't work, and "...[t]he licensee now recognizes that it should not have notified the Commission that construction was completed until the ITA transmitter was fully operational." In the licensee's view the other alleged violations the Commission had cited were "...a relatively minor breach of the Commission's rules by KNON..."

33. *David Fusco*. The burden of proceeding under Issue 2 was on Criswell (See Finding 3 *supra*.). To meet that burden Criswell presented the testimony of David Fusco. Fusco was a volunteer disc jockey at KNON from August 1983 to April 1985. He claims that the logs were intentionally falsified during that period. His accusations takes two forms.

34. First Fusco claims that his superiors instructed him to merely enter data in the log from previously recorded readings. But his testimony about such instructions is nebulous. First he said that this happened on at least two occasions (Tr. 1584). Later (Tr. 1613) he said that Charles Rawls and Mac England[15] had told him to do this on five to ten occasions.

35. Next Fusco claims that almost continuously during his tenure the "Marti" remote control unit was incapable of giving accurate readings. He says it couldn't be calibrated, that the meter fluctuated wildly, and that during one period of time there was a warning note attached to the meter, a warning to the effect that if a person touched the meter they would receive an electrical shock. Fusco also claims that there were times when there were not even any log forms in the control room to fill out.

36. *Agape's Position*. Charles Rawls, Mac England, Lou Sartor, and the present station manager, Jeff Murray all deny they ever instructed David Fusco to falsify logs. More specifically, they never told Fusco to enter erroneous data on the logs; they never told him to copy earlier readings; and they never told him to leave log entries blank for filling in later. Moreover, none of the four are aware of anyone giving such instructions.

37. After KNON went on the air in 1983, says Charles Rawls, and when necessary thereafter, he taught KNON's volunteers how to use all the equipment, including the use of the "Marti" remote control unit. He taught them how to take readings every three hours, how to calibrate the meter, how to sign on and off, how to raise and lower power as required, and how to turn the power on and off at the beginning and end of the day. Rawls also instructed the volunteers on log entries, and told them how to contact an engineer in an emergency.

38. Volunteer meetings were held quarterly. Logging practices were routinely discussed at such meetings. Even after the Commission no longer required logging, logging was still stressed at the volunteer meetings after the Notice of Violation (See Findings 31-32 *supra*.).

39. Mac England taped up the "shock" warning note (See Finding 35 *supra*.). He did so after he received a complaint from someone who claimed they had been shocked by the remote unit. He placed the note so that others would not receive a shock, and notified Staples. Staples found the "short" in the meter, and repaired it. Whereupon England removed the note. The "shock" warning was on the meter for no more than a day or two.

40. There may have been isolated instances when the log wasn't in the control room. This was when someone accidentally walked out with it. On those rare occasions the log would be left on the desk outside and someone would return it to the control room. In addition, there were blank log forms right outside the control room, and volunteers were told where to find them. Rawls doesn't recall a single instance where the transmitter was left unattended.

41. Contrary to Fusco's testimony (Finding 35 *supra*.), the record shows that the "Marti" meter could be calibrated, and it never fluctuated.[16] Lou Sartor testified that in those instances where the meter wasn't working, he would send Staples out to the transmitter and enter whatever reading was then on the meter.

42. In addition to the wealth of oral testimony refuting Fusco's charges, Agape also placed in evidence a series of operator logs covering most of the period that Fusco broadcast over the station. Those logs bore no evidence of deliberate falsification.

43. The evidentiary record also reveals that Fusco's testimony was probably biased. During his tenure he gained the reputation of being a chronic complainer. He brought his pet peeves to anyone's attention at the station who would listen. He had the propensity to make what others believed were racial and ethnic slurs. He developed a hostile attitude towards KNON, hostility based on his belief that the station didn't have state-of-the-art equipment and wasn't professional enough in its broadcasting. He was uncomfortable with the realities of a low-budget volunteer staff station. In addition he became very upset when his program was terminated. He believes the way he was terminated was both unfair and irresponsible.

44. *Intermediate Findings*. The finding is warranted under Issue 2 that Agape did not deliberately falsify the KNON logs between August 1983 and April 1985. Because of his biases against KNON, David Fusco has confused a substandard technical operation with deliberate logging falsifications. Given KNON's emaciated broadcast efforts it is understandable how one could conclude that logging falsifications were occurring. But they weren't. So Issue 2 will be resolved in Agape's favor.

45. Issue 3 will also be resolved in Agape's favor. Louis Sartor, on July 29, 1983, should never have told the Commission that KNON had completed construction and was ready to operate. That statement was inaccurate. But Sartor wasn't deliberately lying about the fact, he was mistaken. He believed and relied on his volunteer engineer, Charles Staples. Staples told him KNON was ready to go. So any doubts about Sartor's truth and veracity will be resolved in his favor. Having observed Louis Sartor's demeanor, the Presiding Officer concluded that he may not have been a very skillful station manager, but he was a basically honest witness.

46. Under Issue 4 the intermediate finding is warranted that KNON did operate at substantially reduced power during those many periods of time when the ITA transmitter wasn't functioning. During those periods, KNON broadcast at a tiny fraction of its output power. However, on such occasions and when the station anticipated operating at reduced power, it notified the FCC and sought special temporary authority to broadcast at reduced power.

47. Similarly, Agape has demonstrated that the "Marti" remote control unit was always capable of positively controlling the transmitter. There were times when the meter was not calibrated and therefore incapable of taking accurate readings. But during such periods Agape either took readings directly at the transmitter site or KNON operated under the assumption that the "Gates" driver

couldn't operate at anything approaching maximum output and that if the power dropped significantly the station wouldn't even be audible. Thus, under Issue 4, Agape's violations of 47 CFR 73.1410(c) will be excused.

48. However, having cleared Agape of logging falsifications, having given it the benefit of the doubt on notice-of-violation misrepresentations, and having excused its rules violations, the evidence adduced on Issues 2-4 warrants one further observation. That evidence certainly buttresses the adverse determination reached under Issue 1 (See Findings 20-26 *supra*.). It is obvious that for over seven and a half years (from September 1977 to May 1985) Agape did not possess the financial, technical, and human resources to conduct even a so-so broadcast operation. When they assured the Commission in July 1983 that they were ready to operate, they weren't. Their substandard broadcasting efforts between July 1983 and May 1985 only reinforces the conclusion under Issue 1 that Agape doesn't deserve to be a Commission licensee.

Issue 5: Real-Party-in-Interest - Misrepresentations Issue

49. Under Issue 5 we must find out if the Association of Community Organizations for Reform Now (ACORN) is a real-party-in-interest to Agape's application.

50. *Agape*. The Agape Broadcasting Foundation holds the license to KNON Community Radio. Agape was formed in 1971 and licensed to build a public radio station. In 1975, after four years of planning and fund-raising, KCHU (KNON's predecessor) signed on the air. It operated for two years as a community radio station until its financial problems became overwhelming. KCHU was never particularly successful in developing a viable relationship with the minority communities of Dallas/Fort Worth. Young Anglo professionals made up the original Agape Board.

51. *ACORN*. The Association of Community Organizations for Reform Now (ACORN) is a nationwide, multiracial neighborhood organization. It organizes low and moderate income groups around economic issues. It is a social reform and improvement activist organization. It started in 1970 in Little Rock, Arkansas, and is now headquartered in New Orleans.

52. The Agape/ACORN relationship dates back to the spring of 1977, while KCHU was licensed to the Agape Foundation, it was funded and operated by Lorenzo Milam. Milam was "Mr. Agape." However, fed up with the financial drain, Milam entered into a management agreement with ACORN on May 19, 1977. The agreement, which became effective on June 1, 1977, provided among other things:

> **ARTICLE TWO: PURPOSE**
>
> This agreement is being entered into to provide for the management of radio station KCHU-FM ... in Dallas, ... Texas, by ACORN, and to set out the terms and conditions of this management agreement. The agreement also establishes the method by which ACORN may assume ownership of KCHU's equipment and transmitter and studio location at the conclusion of the management agreement.
>
> Briefly stated, the consideration to be exchanged by each side in this agreement is as follows: Milam wishes to be relieved of the various burdens associated with operating KCHU, and would like the operation of KCHU to pass to ACORN. For its part ACORN would like to have the opportunity to try operating a radio station. Milam will cede his rights if ACORN will assume the responsibilities.
>
> **ARTICLE THREE: TIME FRAME**
>
> 1. *Management Period*. The duration of the period during which ACORN shall manage KCHU shall last six months, beginning on the first day of June, 1977, and concluding on the first day of December, 1977.
>
> 2. *Evaluation Period*. The entire month of December, 1977 shall constitute a period of evaluation by ACORN, in which ACORN will appraise its performance, have the option to renegotiate an extension of its management contract, or have the option to assume outright ownership of the assets and liabilities of KCHU.
>
> ...
>
> 4. *Exercising Ownership Option*. Should ACORN choose to assume outright ownership of the assets and liabilities of KCHU, it shall notify Milam of its intent to do so by December 23, 1977. ACORN will then assume outright ownership of the assets and liabilities of KCHU as of January 1, 1978. [17]

53. It was during the course of ACORN's management that station KCHU went silent and ceased to exist (See Finding 8 *supra*.). On January 10, 1978, Meg Campbell of the Dallas ACORN addressed a memorandum to one of the original Agape Board members, Claude Albritton.[18] There she discussed the reorganization of the Agape Board of Directors and ACORN's views about such a reorganization. There she stated as follows:

> "... An integral part of the ACORN proposal ... was and is that those four vacancies be selected from a list of eight nominations submitted by us; no more than two of those nominations would be ACORN members to insure the independence of Agape as a 501(c)(3) foundation.
>
> ... should the Board decide to fill the vacancies in a way different from that outlined in the proposal, ACORN would have to consider seriously whether or not it still wished to make a proposal...[19] Since uncertainty about who the names are ACORN might submit might only add to the confusion, below you'll find a list of eight persons we would nominate, if asked to do so by the Agape Bd. of Directors..."

One of the names Campbell recommended was "Leon Gowans, Motel Operator and ACORN member." Leon Gowans has been a member of the Agape Board since "approximately 1979," when he was contacted by a Ms. Bobbye Mangram, then a member of the Agape Board. See Agape Ex. 1, p.1.[20]

54. As previously described (Findings 9-10 *supra*.) in late March 1978, Agape entered into a contract with AM/FM that brought Joseph Fox to KNON as station manager. AM/FM is quartered in New Orleans in the ACORN building, along with CCI (KNON's accounting firm) and the law firm of Bachmann and Weltcheck,

ACORN's attorneys. The building is large with an "ACORN" sign on the front (Tr. 2048, 2122).[21] Both AM/FM and CCI are ACORN affiliated organizations.

55. Under the Agape-AM/FM agreement, "AM/FM shall fill the position of Project Director [Station Manager] for KNON, with the individual being subject to the approval of the Board of Agape..."[22] Fox's activities on Agape's behalf during his tenure as station manager (March 1978 to September 1979) have previously been set out and need not be repeated here (See Findings 9-15 *supra*.).

56. Before Milam entered into the contract with ACORN (Finding 52 *supra*.) Agape had been paying an $850 monthly mortgage payment for its Maple Street studio (Criswell Ex. 2-20, pp. 74-75).[23] But as early as April 8, 1978, the Agape Board of Directors were meeting at ACORN's Dallas headquarters at 4415 San Jacinto, and plans had been firmed up to move Agape's studio and offices there (Criswell Ex. 2-41, pp. 142-143).

57. On January 8, 1980, Janine Farver of AM/FM submitted a memorandum to the Agape Board on "The Future of KNON." There Farver noted that many of Agape's Board members were skeptical of the chance of putting KNON back on the air "...[b]ecause of the lack of attention given to the project by both AM/FM and the Agape Board in the past six months...," and she said "...it is now *our* responsibility to make some active decision concerning the future of KNON..."

58. On February 13, 1981, Wade Rathke, ACORN's Assistant Treasurer and Chief Organizer, sent a memorandum to: (1) Terry Andrews - the head of ACORN in Dallas and then KNON's station manager; (2) Carn Hendrix (KNON's technical engineer); (3) Stephen B. Bachmann, ACORN's and AM/FM's counsel; (4) Lea Lent - ACORN's television coordinator; and (5) his brother D. Rathke - an ACORN organizer. The subject of the memorandum was "Dallas Radio Strategies." There Rathke talked about the "semi-acting chair of the Agape Foundation." Mark Newberger and his (Newberger's) efforts to disband Agape and change the ownership of KNON's license to an organization called Dallas Media Access. Rathke noted that Newberger was against appointing a new Agape Board because it would be a "sham"; i.e., because ACORN would appoint Board members who would then contract with AM/FM.

59. In exploring the weapons ACORN would have available in any organizational conflict it had with Newberger, Rathke noted that "[t]he legal address for Agape is our office in San Jacinto and we administer that office, so we would accept or reject any mail, including [Agape membership] dues." After noting that Agape "[m]embers have a right to an annual meeting each November -- which to my knowledge was not held..." Rathke indicated that he and Terry Andrews would, among other things, "...sign up 30 ACORN members as members of the Agape Foundation and certify them as members and place the money in account for Agape..."

60. Rathke also explored the possibility that Newberger might "...[t]ry to take the station over in revenge at some future meeting of the Agape board."- "The solution," said Rathke, "is eternal vigilance, and perhaps our actually taking over the license for ACORN to prevent limitations on membership or pressure for annual meetings..." Rathke further indicated that "...Terry and I can still go ahead with the footsy work ... and move ACORN in with a vengeance..."

61. On the question of getting KNON back on the air, Rathke said, "[t]he risk is largely financial. If AM/FM went to the bank, and ACORN guaranteed the loan, and we were to lose the station through some legal means, we would be stuck holding the bag..." and he concluded "Let's roll forward toward a people's radio station in Dallas..."

62. Eight days later, Steve Bachmann (Finding 58 *supra*.) responded. He sent a memorandum to Rathke on the "Rehabilitation of Agape ."- There he suggested that if ACORN invests a lot of property into the community radio station venture, "...AM/FM should be very careful to insure that it, and not Agape, owns all equipment." For "if we ultimately lose Agape we should insure that all we lose is sweat, but not property."

63. In his memorandum Bachmann suggests taking over Agape by packing the membership; i.e., by signing up a group of moving members that "...can be predominantly ACORN..."

64. The Rathke (Findings 58-61 *supra*.) and Bachmann (Findings 62-63 *supra*.) memorandums take on added significance when one realizes that between May 30, 1980 and May 30, 1981, there had not been an Agape Board meeting called, and that there hadn't been a quorum on the Board for at least a year before that. See Agape Ex. 2-49. So, even with AM/FM on the scene (See Findings 9-15 *supra*.) both Rathke and Bachmann were talking about taking over a dormant, inactive organization.[24]

65. On May 15, 1981, four members of KNON Radio Station requested a meeting of the KNON membership and Board. At least one of those four, James Miller, was an ACORN member. See Agape Ex. 2-47 and Criswell Ex. 2-61. A meeting was set up for May 30, 1981 at the ACORN headquarters and KNON office at 4415 San Jacinto Street. See Agape 2-48.

66. A membership meeting was held on May 30, 1981. Having determined that the terms of the Board members Mark Newberger (Findings 58-60 *supra*.) and Dennis Gross had expired, an election to fill those two vacancies was held. At least one of those two vacancies was filled with an ACORN member, Lena Hodge. See Agape Ex. 2-49, and Criswell Ex. 2-61.

67. During the meeting the acting chairperson, Bobbye Mangram, reported that AM/FM had continued to provide technical assistance to KNON even though the agreement between the two parties had expired. When the financial feasibility of putting the station back on the air in the near future was discussed, Ms. Mangram reported that ACORN was willing to back a $15,000 loan if the Board was interested. That discussion was tabled until there could be further talks with ACORN about this possibility.

68. A further Agape Board meeting was held on July 22, 1981. Of the four Board members who attended, at least two (Leon Gowans and Jim Miller) were ACORN members. Lea Lent for AM/FM attended the meeting. The Agape AM/FM contract was renewed. See Agape Ex. 2-27, and Criswell Ex. 2-25.

69. The next Board meeting was held on September 29, 1981. There Peter Glassman of AM/FM was hired as Project Director (See Finding 55 *supra*.), and there was a short discussion about the ACORN-backed loan for $15,000. Bobbye Mangram asked that the duties of the fund-raising/outreach and construction committees be typed and made available for all ACORN neighborhood meetings. The October 17, 1981 meeting was attended by four Agape Board members. At least two of those four,

James Miller and Lena Hodge, were ACORN members.[25] The October 17th meeting opened with Jerry Brown (Finding 24 *supra*.) talking about how a radio station can help groups like ACORN, and others fighting for social justice.

70. The annual Agape membership meeting was held on November 2, 1981. There Joe Norvell reported that he had located a studio building. He was advised to pursue all options but that since ACORN had offered the second floor of their building for Agape's studios, this was not a priority. KNON accepted ACORN's offer, and to this day occupies the second floor of ACORN's building at 4415 San Jacinto. It only pays ACORN $40 a month rent. Since late 1983 KNON has also had an office downstairs in that building.

71. In August 1982 the KNON Board of Directors decided co establish a door-to-door canvas as a way of meeting monthly operating expenses and depositing funds into the equipment account. About that time Peter Glassman, the Project Director (Finding 69 *supra*.), left KNON. He was replaced by Terry Thompson, the Executive Director of the Arkansas Institute for Social Justice (AISJ) AISJ at that time was housed in the same building as KNON and ACORN[26] Thompson was replaced as Project Director by Lou Sartor in January 1983.

72. Lou Sartor graduated from the University of South Florida in June 1977 with a B.A. in Economics. He was trained in Tulsa in 1978 as an ACORN organizer and was transferred to Houston later that year. In July 1980 he was assigned to run the Denver office for Colorado ACORN. In 1982 he was the national ACORN recruiter, a position he held until he accepted the KNON position.

73. In early 1983 Eric Anthony headed up KNON's fund-raising activities. He had been an ACORN door-to-door canvasser. He met with ACORN's canvas director frequently. In canvassing ACORN allowed KNON to use ACORN's name. KNON's solicitation literature referred to ACORN "...as being one of the organizations that was helping to sponsor the station in getting on the air." Some of KNON's flyers mentioned ACORN as one of the organizations that was working to assist the station.

74. Anthony described KNON's canvassing procedures. He said that "if the canvassers were ACORN members, as I was, we could introduce ourselves as being ACORN members, and that we were part of a group that's working to -- well, we introduced ourselves as ACORN members and established some familiarity with ACORN with the person at the door, followed by a discussion of the radio station, and kept it on the subject of the radio station, and made sure that people understood that this was a separate and distinct entity..."

75. Agape's canvassing procedures got into trouble with the City of Dallas' Department of Consumer Services. The Dallas City Code states that "if a person or organization conducts or manages a charitable solicitation in the name of or on behalf of another person or organization, each entity shall obtain a charitable solicitation permit." The City received a complaint in February 1983 that Eric Anthony, who identified himself as being with ACORN and that he was soliciting for both ACORN and KNON. So on February 15, 1983, the Director of Consumer Services issued a cease and desist order to KNON/Agape. The Order informed Agape that "ACORN must have a permit if they solicit for KNON."

76. On March 29, 1983, Anthony filed an application for a charitable solicitation permit. In the application he indicated that door-to-door solicitations would be made using ACORN as a sponsor. A transmittal letter stated that the solicitors would identify themselves as being from ACORN and that ACORN was one of the station's sponsors. The City of Dallas denied that application.

77. Agape filed another application in May 1983. This application did not indicate that ACORN would solicit on Agape's behalf. However, the transmittal letter did. The Department of Consumer Affairs mistakenly overlooked the information set out in Agape's transmittal letter and granted the application.

78. Meanwhile, on January 1, 1983, at the time Sartor came aboard with Agape, Agape entered into an agreement with Citizens Consulting, Inc. (CCI). See Finding 54 *supra*. CCI, an accounting and bookkeeping firm, is headquartered in ACORN's building at 628 Barrone Street, New Orleans, Louisiana. Strangely, the agreement, which was signed by Lou Sartor on Agape's behalf, also lists Agape's address as being "628 Barrone Street, New Orleans, Louisiana."- One of the accounting items CCI agreed to provide was "...such financial reports as may be required by the Boards or the Chief Organizer..." Agape does not have a position entitled "Chief Organizer." Only ACORN does. See Finding 58 *supra*.

79. Four days later, on January 5, 1983, Charles Rawls started with KNON. He agreed to help raise money to get the station back on the air, and that when the station was ready to go on the air he was to become Program Director. Before coming to KNON, Rawls worked full time for Carolina Action in North Carolina, another ACORN affiliate.

80. It was in this same time period that Agape sought permission from the Federal Communications Commission to build a smaller, less expensive radio station so that KNON could sign on the air within its designated license period. See Finding 16 *supra*. So it was largely through the efforts of ACORN, and its affiliates AM/FM and CCI, that KNON was able to sign back on the air on July 29, 1983. See Finding 17 *supra*. On September 27, 1983, the ACORN-backed $15,000 loan came through. See Findings 67 and 69 *supra*.

81. Agape then prepared and submitted its 1984 Application for Funding to the Campaign for Human Development (CHD). It asked for $35,000. The proposal was submitted by Louis J. Sartor, Jr., "Station Manager, Project Director." Sartor included in the application a brief biographical sketch of each Agape Board member. He represented that six of the seven were ACORN members; i.e., Leon Gowans, Lena Hodge, Alberta Marroguinn, James Miller, Evelyn Simms, and Ruth Martin.[27]

82. In describing the KNON project budget in the CHD funding request Sartor asked for "*Travel Expenses* including mileage for staff meetings (as an affiliate of ACORN) and travel to events such as the NFCB Conference where one Staff Member will attend..." Under the budget item entitled "Occupancy Expenses," Sartor said, "Office utilities are included in our rent which remains low because ACORN is our landlord."[28]

83. In August 1983, Lou Sartor arranged to have a sign put over KNON's studios at 4415 San Jacinto. Two items appeared on that sign: the KNON call letters and a drawing of an acorn. That sign remained for the balance of Sartor's tenure; i.e., until October 1984. The sign was still there when present Project Director-Station Manager, Jeff Murray, started working at KNON.[29] Sometime between June of 1985 and January 1986, a new sign was installed which does not depict an acorn.

84. On November 23, 1983, a KNON planning meeting was held.[30] Five people were present. The names and positions of the five people who met to discuss KNON's future is illuminating. They were: (1) Lou Sartor - KNON's Project Director (Footnote 28 *supra*.); (2) Terry Thompson - head of the Arkansas Institute for Social Justice (See Finding 71 *supra*.); (3) Terry Andrew - ACORN's regional organizer in Dallas; (4) James Mason - ACORN's canvas director in Dallas; and (5) Phil S. - an ACORN canvasser. See Criswell Ex. 2-44. At that meeting KNON's financial position was discussed in depth.

85. In the summer of 1984, around the time of the Republican National Convention, ACORN launched a "dump Reagan" project. KNON's Program Director, Mac England (Finding 15 *supra*.) wrote a memorandum to KNON's disc jockeys encouraging them to take a "dump Reagan" stance on the air. [31]

86. Part of ACORN's "dump Reagan" project was the "Tent City Counterconvention."- KNON provided extensive coverage of these protest activities, including live remote broadcasts. On several occasions during these protest rallies the ACORN master of ceremonies referred to KNON as "ACORN's radio station." Spokespersons from other organizations also referred to KNON as being "ACORN's radio station."

87. In early 1985 Agape decided to replace its ITA transmitter with a new unit because the ITA "...seemed to be just falling apart..."- (Tr. 2442-2443). But they faced a problem. Neither the Merchant's State Bank nor the Grand Bank would lend them the money because Agape "...could not supply sufficient collateral..." (Tr. 2443). Then, at the February 16, 1985 Board meeting Jeff Murray (Finding 83 and Footnote 29) suggested "that ACORN might be willing to put up their office building for collateral." Leon Gowans, an Agape Board member, and active member of the Dallas ACORN chapter was appointed to talk with Terry Andrews (See Finding 84 *supra*.) and the ACORN Board about that possibility. See Criswell Ex. 2-36.

88. Between the Board's February 16, 1985 meeting and the next meeting on April 16, 1985, ACORN drew up an agreement for Agape to sign so that ACORN could put up 4415 San Jacinto for collateral. That agreement is summarized as follows: ACORN agreed to use its building in Dallas as collateral to finance Agape's purchase of equipment up to $60,000.

89. In return Agape agreed: (1) to add two more seats to its Board of Directors (an increase from 7 to 9 Board members) with those two extra seats to be designated as ACORN representatives and appointed by ACORN's Dallas Executive Board; (2) to fill the next two vacant seats with ACORN representatives; and (3) to fill the next third, fourth, fifth and sixth non-designated resignations with Arkansas Institute for Social Justice representatives and appointed by the AISJ Board. See Findings 71 and 84 *supra*.

90. Agape further agreed to renew the AM/FM and CCI contracts. See Findings 54-55, 67-68, and 78 *supra*. And finally, Agape agreed to subordinate all other debt to the loan payments for which ACORN's building served as collateral.

91. On May 14, 1985, the Agape Board met and approved the agreement. and the Agape Board Chairman, Domingo Rios, signed it. At a further Board meeting on June 11, 1985, the by-laws changes that resulted from the ACORN agreement were accepted in full by a unanimous 6-0 vote. [32] On July 31, 1985, Terry Andrews of ACORN signed the deed of trust, and the First U.S. Financial Corporation, the equipment supplier, signed the equipment lease. None of the above events were reported to the Commission.

92. On November 12, 1985, Criswell moved Co enlarge the issues against Agape. It sought, among others, a real-party-in-interest issue based on the deed of trust described previously. Agape opposed Criswell's motion on November 25, 1985, and Criswell replied on December 6, 1985.

93. After the pleadings had been filed, but before a ruling was issued, the Agape Board met again, on December 18, 1985. They unilaterally revoked the agreement and went back to their pre-June 11, 1985 by-laws. They did so because they realized that under the May 14, 1985 agreement, they would eventually lose *de jure* control of the station. A modified agreement was signed by Andrews and Gowans on December 18, 1985. Agape paid ACORN nothing in return for modifying the agreement.

94. *Issue 5: Intermediate Facts.* The test whether a third person (in this case ACORN) is a real-party-in-interest is whether that person has an ownership interest, or is or will be in a position to actually or potentially control the operation of the station. *Mobile Phone of Texas, Inc.*, 52 RR 2d 1455, 1459 (1982). Such control need not be legal control in the formal sense, but may consist of actual control by virtue of the special circumstances presented. *Lorain Journal Company* v. *F.C.C.*, 351 F.2d 824, 829 (D.C. Cir.), *cert. denied*, 383 U.S. 967 (1965).

95. When all the circumstances are analyzed the finding is inescapable that ACORN is an undisclosed principal in Agape's application and the real-party-in-interest. The record evidence shows that since the late Spring of 1981 ACORN has been in *de facto* control of the Agape Broadcasting Foundation. In fact, in 1985 ACORN embarked on a plan to move from *de facto* control of Agape to *de jure* control (See Findings 87-93 *supra*.). And it probably would have fully implemented that plan if it hadn't been for Criswell's November 12, 1985 motion to enlarge the issues. [33]

96. It must be remembered that after Lorenzo Milam decided to move on to greener pastures (Findings 52 *supra*.), Agape Broadcasting Foundation fell on bad times. Milam had funded and operated KCHU. Without his financial resources and his technical expertise Agape floundered. No Agape Board meetings were held between May 30, 1980 and May 30, 1981, and there hadn't been a quorum on the Board of Directors for a year before that (Findings 59 and 64). It became an inactive, dormant organization. In fact, in 1981, Mark Newberger, Agape's semi-active chairperson, contemplated disbanding Agape. See Finding 58 *supra*., and Criswell Ex. 2-20. p. 6.

97. Into the breach stepped ACORN.[34] It assumed a dominant role in getting Agape functioning again. It assumed *de facto* control of Agape, and turned it into a viable affiliated organization. By using a combination of several devices ACORN obtained and retained *de facto* control over Agape and KNON's operations. A summary of these devices is appropriate. First they had local ACORN members become Agape members (Findings 59, 60 and 63 *supra*.). Next, they started placing and continued to place ACORN members or ACORN sympathizers on Agape's Board of Directors (Findings 53, 65, 66 and 68 *supra*.). Third, and most importantly, they began placing ACORN members or ACORN sympathizers in key KNON management positions (Findings 55, 69, 71, 72, 73, and 79 *supra*.). In fact, KNON has never had a Project Director (Station Manager) who didn't have an extensive

ACORN background. Thus, through membership, and management personnel changes, ACORN established a close personal relationship between it and Agape.

98. Next Agape assumed physical dominance over Agape's headquarters and KNON's studio location by moving them into ACORN's Dallas headquarters at 4415 San Jacinto. It got Agape to establish its studio there by offering them an unusually favorable rent of $40 per month (See Findings 56, 65, 70 and 82 *supra*.) ACORN recognized full well the importance of this physical dominance. For on February 13, 1981, ACORN's chief organizer, Wade Rathke pointed out that "|t|he legal address for Agape is our office in San Jacinto and we administer that office, so we would accept or reject any mail, including |Agape membership dues|."

99. Not only did ACORN assume dominion over Agape's personnel and physical assets, it assumed control over Agape's operational functions through the use of two of its affiliates. It got Agape to enter into a management contract with its non-profit management corporation, AM/FM (See Findings 9, 10, 54, 55, 57, 67-69, 80 and 90 *supra*), and into an accounting and bookkeeping contract with its affiliate, Citizens Consulting, Inc. (See Findings 78, 80 and 90 *supra*.).

100. Moreover, from the outset ACORN has dominated Agape's financial affairs. Initially it backed a $15,000 loan that Agape had obtained from a commercial institution (See Findings 61, 62, 67 and 69 *supra*.); its personnel canvassed door-to-door to raise funds for Agape (See Findings 69, 71; and 74-77 *supra*.); and later it used its Dallas headquarters at 4415 San Jacinto as collateral so Agape could obtain some $60,000 worth of much needed broadcast equipment (See Findings 87, 88 and 91 *supra*.). The record shows that key ACORN personnel (to the exclusion of any Agape Board members) have met and planned KNON's financial affairs (See Findings 58 and 84 *supra*.).

101. Through the use of these several devices (Findings 97-100 *supra*.) ACORN has assumed and retained *de facto* control of Agape since the late spring of 1981. But the record also shows something else: Agape has been a willing servant. On at least three occasions Agape has held itself out as being ACORN controlled. It prepared and submitted its 1984 funding application to the Campaign for Human Development. There it asked for $35,000. In support it pointedly represented that six of its seven Board members were also ACORN members; it put in a request for travel expenses "...as an affiliate of ACORN..."; and it proudly noted that "...our rent ... remains low because ACORN is our landlord..." (See Findings 81-82 *supra*.).

102. From August 1983 until sometime after June 1985 (about two years) KNON had a sign posted over the entrance to its studio. Lou Sartor, KNON's Project Director (Station Manager) had the sign put up. Two items appeared on that sign: the KNON call letters, and a drawing of an acorn. Thus, Sartor - who believed and acted like KNON was an ACORN affiliate - held that fact out to the public (Finding 83 *supra*.).

103. Third, and finally, when Agape entered into its 1983 accounting and bookkeeping agreement with CCI, it listed its (Agape's) legal address as being "628 Barrone Street, New Orleans, Louisiana." 628 Barrone Street is owned by ACORN, and is its New Orleans headquarters. (See Findings 78 and 54 *supra*.).

104. Not only does the record show that ACORN has *de facto* control over Agape, and that Agape is a willing servant, the record also shows that when ACORN has called on KNON to deliver, it has delivered. In the summer of 1984, and during the Republican National Convention, ACORN mounted a "dump Reagan" project. Part of that project was the "Tent City counterconvention." KNON provided extensive coverage of these protest activities, including live remote broadcasts. During the course of these broadcasts the ACORN master of ceremonies referred to KNON as being "ACORN's radio station." So did other speakpersons on these broadcasts.

105. Based on the foregoing (Findings 49-104 *supra*.) it is found that ACORN is now and has been a real-party-in-interest to Agape's application (BRED-830501BV), and by failing to report that fact, Agape has lacked candor with the Commission about its ownership structure. Consequently, Agape is not basically qualified to be a Commission licensee, and is not eligible for comparative consideration with Criswell.

Issue 6: The Share-Time Issue

106. Under this issue and assuming that Agape is basically qualified to be a Commission licensee, we must determine if a shared-time arrangement between the applicants would result in the most effective use of the channel(s) and thus better serve the public interest, and if so, the terms and conditions thereof.

107. *Agape's Position*. Agape points out that neither party has submitted any evidence that a shared-time arrangement would not be feasible or that there are such strong antagonistic interests that one may not be put into effect. It also refers to an aborted settlement effort that it and Criswell engaged in. See FCC 86M-792, released March 3, 1986; FCC 86M-1148, released April 3, 1986; FCC 86M-1408, released April 25, 1986; and a letter dated August 4, 1986 from Criswell's counsel to the Secretary of the FCC. But it acknowledges that the Presiding Officer is not empowered to order shared-time arrangement under the terms of that settlement.

108. *Criswell's Position*. Criswell has no interest in sharing time with Agape basically for two reasons. First it notes that "|e|ach is poles apart philosophically from the other." Secondly, it rejects the assumptions underlying Agape's share-time proposal. See page 18 of Agape's Phase 1 Findings and Page 5 of Criswell's June 23, 1986 Reply to Proposed Findings of Fact and Conclusions of Law.

109. *Intermediate Findings on Issue 6*. Issue 6 is declared moot. A shared-time arrangement assumes two or more basically qualified applicants. That condition doesn't exist here. Criswell is basically qualified. Agape isn't (See Findings 6-25, and 49-105 *supra*).

110. However, even if Agape were basically qualified, the Presiding Officer would be loath to impose a share-time agreement on either applicant. Philosophically they are world's apart; their methods of operation differ completely; and even their aims and objections diverge. So the share-time issue (Issue 6) plays no part in the outcome of this proceeding.

Issue 7: Areas and Population

111. Under Issue 7 we must determine the areas and populations that Criswell and Agape would serve within their respective primary service contours, along with the availability of other noncommercial educational FM signals within their respective areas.

112. As previously noted (Findings 1, 16 and 80 *supra*.), Agape would operate with an ERP of only 9.6 kW at 146 meters above average terrain, while Criswell proposes an ERP of 100 kW at 483 meters above average terrain. Thus the areas and populations comparison is a total mismatch. The following chart shows the total areas and populations within each applicant's proposed 60 dBu contour.

CHART

Applicant	Area (Sq. Km.)	Population
Agape	4,373	2,179,179
Criswell	23,019	2.986,122

Agape would serve no areas which aren't also served by Criswell.

113. The following chart depicts the new noncommercial educational FM service that Criswell would provide within its proposed 60 dBu contour that Agape wouldn't.

CHART

	Area (Sq. Km.)	Population
1st service	1,825	25,216
2nd service	4,311	77,621
3rd service	6,227	179,411
4th service	5,051	269,569
5th service	1,232	255,127
Total	18,646	806,943

114. *Issue 7 Intermediate Facts*. Agape doesn't serve any areas that Criswell serves. In addition, Criswell will serve over 800,000 more people (18,646 sq. km.) than Agape. Most importantly, Criswell would eliminate a noncommercial educational FM "white" area of 25,216 people (1,825 sq. km.), a noncommercial education FM "grey" area of 77,621 people (4,311 sq. km.), and an additional undeserved noncommercial educational FM population of over 704,000 people. So Criswell is entitled to a substantial and decisive preference for comparative coverage. See *RAM Enterprises, et. al.*, 57 FCC 2d 844 (Rev. Bd. 1976); *FBC, Inc.*, 55 RR 2d 1344 (Rev. Bd. 1983); and *Christian-Broadcasting of the Midlands*, 99 FCC 2d 578, 582-583 (Rev. Bd. 1984).

Issue 8: The Non-Commercial Comparative Issue

115. Under Issue 8 we must look at three things. First we must determine the extent to which each proposed operation will be integrated into the overall educational operation of their respective organizations; secondly, we must determine the extent to which each proposed operation will be integrated into each applicants' objectives; and third we must find out if there are any factors that demonstrate that one applicant will provide a superior educational broadcast service.

116. *Agape Broadcasting Foundation, Inc.* Agape, a nonprofit corporation, was organized under Texas State law in 1971. It has three major purposes: (1) to establish and operate exclusively for educational purposes noncommercial educational radio broadcast stations; (2) to broadcast and distribute exclusively educational matters, matters and programs of an artistic, civic, cultural, entertaining, instructional, religious or scientific nature; and (3) to implement such other exclusively educational activities as are consistent and desirable with the foregoing purposes.

117. Agape was originally organized to effectuate a community radio station. It is not now and never has been affiliated with an educational institution. Its present objective is to serve those segments of its broadcast area who are largely neglected by both the commercial and non-commercial media and who otherwise have no sources of entertainment or information directed specifically to their concerns and cultures; i.e., "blacks, hispanics, jews, asians and low and moderate income individuals."

118. You can become a member of Agape by being a resident of KNON's service area and by simply making a grant or paying for broadcast services in an amount of $15.00 or more. There are currently eight members on the Agape Board of Directors: Leon Gowans, Arquilla Smith, Ruth Martin, Domingo Rios, Alberta Marroquin, Evelyn Simms, Lena Hodge, and James Miller. The Board of Directors has been organized and its membership changed to reflect and represent low and moderate income segments of the population as well as minority, racial and ethnic components of the station's service area. A brief biographical summary of each Board member follows.[35]

119. *Leon Gowans*, a Black male, was born on March 3, 1924. He has resided in the Dallas area since 1946. He has been a member of the Dallas Chapter of ACORN since 1972; a member of the Dallas Jaycees since 1970; a member of the Lower Peach Branch of Dallas since 1972;[36] a Trustee of the Greater Bethlehem Baptist Church since 1951; and a member of the Board of Directors of the Martin Luther King Health Clinic since 1980. Mr. Cowans has been self-employed in the real estate business since 1970.

120. *Arquilla Smith*, a Black woman, was born on February 1, 1918. She has resided in the Dallas area since 1968. She is and has been an active member of ACORN since 1982; a member of the Camp Wisdom United Methodist Church since 1969; and an active member in the Good News Club. [37] She was a nurse from 1967 to 1983.

121. *Ruth Martin* was born in Fort Worth in 1944. She is a life-long resident of Fort Worth, and currently resides in the Agape service area. She was an active member of the Fort Worth Chapter and a national Board officer of ACORN from 1978 to 1983; a Board member of the Tri-Ethnic Multi-Purpose Center from 1979 to 1982; and on the Board of Directors of the Community Action Agency from 1980 to 1983. Mrs. Martin is a housewife.

122. *Domingo Rios*, an Hispanic male, was born on February 20, 1927. He has resided in Dallas Texas since 1966. He has been a machinist since 1967 During the '70s Rios was active in PTA work and Union activities. In 1984, he was a Board member of "La Voz Del Anciano-Mexicano Americano" in Dallas, and was Chairman of its Budget Committee in 1985.

123. *Alberta Marroquin*, an Hispanic female, was born on August 12, 1943. She has been a Dallas resident since 1963. She is a member of ACORN, and active in John F.

Peller School PTA. She received a B.S. degree in education from the Texas Women's University in 1982, and is currently a bilingual kindergarten teacher.

124. *Evelyn Simms*, a Black female, was born in West Palm, Florida, on January 30, 1929. She has resided in Fort Worth, Texas since 1979.[38] Up until 1983 she was a national Board member of ACORN. She is active in Stop Six Neighborhood Action, a community improvement group, and a member of the Greater St. Paul Baptist Church in Fort Worth. From 1961 to 1973, Ms. Simms was a nurse in California. She retired from nursing in 1973.

125. *Lena Hodge*, a Black female, was born on August 2, 1911. She has resided in Dallas since 1943. She worked as an elementary school teacher from 1946 to 1973. For 30 years she has been an active member of the Dallas YWCA. Since 1983 she has been a member of the Board of Directors of Dallas Legal Service, an organization that provides legal assistance to those otherwise unable to afford such services.

126. In conjunction with its 1983 renewal application, Agape conducted a formal, general public telephone survey and community leader survey. There Agape identified ten problems facing its community of license: crime, unemployment, rising utility rates, pollution, traffic problems, inflation, housing, neighborhood decay, inadequate city services, and education. Agape is attempting to address these problems by emphasizing service to the low and moderate income community. It emphasizes service through the block programming service concept.

127. Block programming devotes blocks of time during the day to programming designed to reach specific groups. The blocks are designed to attract targeted groups of listeners. Then educational and informational programming as well as public service announcements are aimed at those groups during the block. Block programming is also targeted at groups of individuals that Agape determined needed service as a result of its ascertainment (See Finding 126 *supra*.). Agape broadcasts 60 PSAs a day, 30 to 60 seconds in length, to provide educational information to its targeted block audience.

128. For example, on Saturdays KNON devotes a three hour block of time exclusively to teen-oriented programming; it devotes two hours a day, seven days a week to Latin oriented programming; and it broadcasts a block of three hours each week to Vietnamese, Latin, and Cambodian programming. During these time blocks the PSAs are targeted to their respective audiences. For example, during the teen-oriented block, the PSAs deal with suicide prevention, drug abuse, and reasons to stay in school.

129. The *Criswell Center for Biblical Studies*. Criswell, a non-stock, non-stock, non-profit Texas corporation, governed by a 12 person Board of Directors.[39] The Board members are elected by the congregation of the First Baptist Church of Dallas, the largest Southern Baptist Church in the nation. On an average Sunday over 7,000 people attend Sunday School, and the Church has an annual budget of over 9 million dollars. You must be a Church member to become eligible for election as a Criswell Board member, and if a Board member terminates his affiliation with the Church, he becomes ineligible to serve on the Board and must resign.

130. The First Baptist Church felt that it needed an educational institution to train not only its own Pastors, Sunday School Teachers, and Church staff members, but those of other outside Churches as well. So, in 1971, they formed the Criswell Center for Biblical Studies. The Center is made up of three educational divisions: (1) the Criswell Bible College - a four year degree granting institution; (2) the Criswell Bible Institute which offers a three year diploma and an evening school program; and (3) the Criswell Graduate School of the Bible which grants advanced academic degrees. Criswell's degree granting activities are accredited by the Southern Association of Colleges and Schools.

131. The eleven member Criswell Board is as follows: Edward J. Drake (Chairman), Ruth Ray Hunt, Scottie H. Ashley, Joe Neel, Jim M. Bolton, Charles C. Tandy, Dewey A. Hunt, Jr., Richard I. Kearley, Ralph W. Pulley, Jr., Hershel V. Forrester and Curtis Baker. A brief biographical summary of each Board member follows.

132. *Edward Drake* is the Mayor of University Park, a community wholly enveloped by Dallas. He has lived in Dallas since 1924. A practicing attorney, Drake is a member of the Texas Advisory Commission on Intergovernmental Relations; the current Chairman of the American Cancer Society, Dallas County Unit; and a guest lecturer at the Taft Institute of Public Affairs at the University of Texas.

133. *Ruth Ray Hunt* has lived in Dallas since 1943. She is an active volunteer and fund-raiser with the American Cancer Society, American Heart Association, Baylor University Medical Center, Baylor University Music Department, and the Dallas Museum of Fine Arts. She is Vice-President of Hunt Oil Company and Hunt Consolidated Resources, Inc.

134. *Scottie Ashley* has been a Dallas resident since 1981. He is a Certified Public Accountant, an attorney, President of Ashley Properties, and Vice-President for Winco Equipment Co. From 1977-1983, Ashley was President of the Irving Hospital Foundation. He is presently a Director of the Allied Bank of Irving, a Director of Microton Industries, a member of the Irving Chamber of Commerce, and a Trustee of Dallas Baptist University.

135. *Joel Neel* lived in Dallas from 1964 to 1979. He currently resides in Rockwall, Texas. A commercial real estate broker and investor, Neel is on the Advisory Board of Skyline Savings and Loan Association. He was formerly a member of the Board of Governors of the Dallas Board of Realtors.

136. *Jim M. Bolton*, an investment banker, has lived in Dallas since 1970. He is President and Chairman of United States League Trust Company, a member of the Board of Trustees of Baylor University, a member of the Board of Trustees of Southwestern Seminary, Fort Worth, Texas, and Chairman of the Fellowship of Deacons of the First Baptist Church of Dallas.

137. Charles *C. Tandy* a physician, has lived in Dallas since 1949. He is a member of the Board of Trustees of the CAM International and the Methodist Hospitals of Dallas. He is also a member of the Board of Trustees of the Republic Bank of Oak Cliff and the Dallas/Fort Worth International Airport. He is also a clinical professor of anesthesiology at Parklane Memorial Hospital in Dallas.

138. *Dewey A. Hunt, Jr.* has lived in Dallas since 1944. From 1973 to 1974 he was President of the Dallas Apartment Association, and from 1978 to 1979, he was President of the Texas Apartment Association.

139. *Richard I.* Kearley, Jr., an electrical engineer and President of American Business Electronics, has lived in Dallas since 1956. He has been a member of the Dallas Rotary Club since 1981, and one of its Directors in 1983.

He is also a member of the Institute of Electrical and Electronic Engineers and the American Society of Industrial Security.

140. *Ralph W. Pulley, Jr.*, an attorney, has lived in Dallas since 1950. From 1955 to 1965, he was a member of the Athletic Committee, Dallas Chamber of Commerce; since 1968 he has been President of the All-Sports Association of Dallas; and since 1974 he has served as a Trustee of Southwestern Seminary, Fort Worth.

141. *Herschel Forrester*, a real estate and insurance broker, has lived in Dallas for over 50 years. He is a member of several area Chamber of Commerce Chapters, a member of the Board of Directors of First City Bank - Market Center, a Trustee of Dallas Baptist University, and a member of City of Dallas Zoning Ordinance Advisory Committee. He is also the Director of the Dallas Chapter of Fellowship of Christian Athletes.

142. *Curtis Baker*, the Chairman and Chief Executive Officer of Terra Marine Energy Company, has lived in Dallas since 1965. He is one of the Directors of the Texas American Bank, McKinney, Texas, a member of the Budget Control Committee of the First Baptist Church of Dallas, and Chairman of its Missions Committee.

143. Criswell's broadcast operations are an educational outreach for the Criswell Colleges. It allows the educational divisions to extend Criswell's educational philosophy to a much wider audience than would otherwise be the case. Criswell believes that Biblical principles should be integrated into every area of education and every area of life. So an attempt is made in all of the various facets of programming to expose the listening public to the various questions which face modern man. Therefore Criswell views its broadcast operations as part of a "communications ministry."

144. Criswell targets its communications at the adult Christian family audience. This religious format devotes about 60% of its live programming to easy listening or religious music. Except for the broadcasting of public service announcements and the KCBI Notebook, the remainder of Criswell's programming has a distinct religious flavor. The KCBI Notebook provides a bulletin board for other Church's and religious organization's announcements of activities and meetings.

145. Every year, during the month of June, KCBI listeners are asked to list their most and least favorite programs. Criswell uses this information to make programming decisions. As a result Criswell became aware of the need for a weekly live show for children called "89 Sunshine Place" and a weekly show targeted at the minority community called "Amen Corner." [40]

146. Criswell represents that it will install redundant power supplies at its transmitter site as well as sufficient equipment to broadcast live from the transmitter site. This will permit it to provide a broadcast service including emergency information during any power outage.

147. *Intermediate Findings*. Both proposed operations will be integrated into the overall educational operation of their respective organizations. Agape, through its block programming format, along with its interrelated PSAs can reach the poor and ethnic minorities within its proposed service area. On the other hand, Criswell, an accredited institution of higher learning, will integrate the frequency into the educational operation of its seminary thereby fulfilling its objective; i.e., to teach and educate in the field of Christianity. Moreover, the Board of Directors of both organizations are well equipped to carry out their respective laudable objectives. So neither Agape nor Criswell is entitled to any comparative advantage under the first two non-commercial criteria. See Finding 115 *supra*.

148. It is under the third criterion that Criswell prevails. It is technically far better equipped to fulfill its objective than is Agape. Its decisive and substantial comparative coverage advantage (See Findings 111-114 *supra*.) leads to the inevitable conclusion that Criswell will provide a superior educational broadcast service. It will serve over 800,000 more people than Agape will, and will bring a non-commercial educational FM service to substantial undeserved areas and populations. Thus the intermediate finding is warranted that Criswell is the superior applicant under Issue 8.

Ultimate Findings of Fact andPreliminary Conclusions of Law

1. Two applicants remain in the running for FM Channel 215C, 90.9 MHz in Dallas, Texas. Agape Foundation, Inc. (Agape) seeks to have the license for non-commercial station KNON-FM renewed. It would operate at 32 degrees 45'52" N., 96 degrees 52'06" W with an ERP of 9.6 kW at 146 meters above average terrain.

2. The other non-commercial educational applicant, the Criswell Center for Biblical Studies (Criswell), proposes to broadcast at 32 degrees 35'23" N., 96 degress 58'10" W with an ERP of 100 kW at 483 meters above average terrain.

3. Evidence was adduced on eight factual issues (Issues 1-8) and the ultimate conclusionary issue (Issue 9). Issues 1-5 are basic qualifying issues that Agape must face. Issue 6 is a share-time issue, while Issues 7-8 are comparative issues.

The Basic Qualifying Issues

4. We must turn first to the basic qualifying issues that Agape faces. For it is axiomatic that only basically qualified applicants are entitled to a comparative analysis. See e.g. *Louis Adelman*, 29 FCC 1223, 18 RR 1062 (1960) affirmed *sub. nom Guinan* v. *Federal Communications Commission*, 297 F.2d 782, 22 RR 2026 (1961).

5. *Issues 2-4*. The false logging issue (Issue 2), the interrelated misrepresentation issue (Issue 3), and the interrelated rules violation issue (Issue 4) will be resolved in Agape's favor (See Findings 27-48 *supra*.). The record shows that Agape kept sloppy and incomplete logs. But those logs were sloppy and incomplete because KNON had a transmitter that kept falling apart (e.g. see Finding 87 *supra*.). However, there is no persuasive evidence that Agape ever deliberately falsified its transmitter logs. So Issue 2 is resolved in Agape's favor.

6. Similarly, Agape will be exonerated under Issue 3, the misrepresentation issue. Stated another way, any doubts about KNON Station Manager Lou Sartor's truth and veracity will be resolved in his favor. It's true that Sartor should never have told the Commission that KNON had completed its construction (resurrection) and was ready to operate on July 29, 1983. It wasn't, and Sartor should have known that it wasn't. So, unquestionably Sartor's representation was inaccurate. But Sartor wasn't intentionally lying, he was mistaken. He believed and had relied on his volunteer engineer Charles Staples' advice. Staples, who had sold the substandard ITA transmitter to Agape, had pronounced it ready to operate [41] Sartor, in turn, relayed that information to the Com-

mission. So while the principal (Sartor) is responsible for the acts of his agent (Staples), it cannot be said that Sartor lied when he pronounced KNON operable.

7. Having cleared Agape of false logging and operational misrepresentations, we can then excuse it of the several, but isolated, rules violations that occurred between August 1983 and April 1985. There were times when KNON personnel failed to calibrate and test the station's remote control and monitoring equipment as often as was needed to ensure proper operation. See Findings 39 and 47 *supra*. Thus 47 CFR 1410(c) was violated on several occasions. But the record also reflects that during the same time period, KNON-management made a good faith effort to comply with the Commission's remote control and monitoring rules; and that the few rules violations that did occur weren't deliberate. So it would be unduly harsh to hold that Agape is not basically qualified to be a Commission licensee because of those violations. Issue 4 is also resolved in Agape's favor.

8. *Issue 1: The Failure to Commence Operation*. While Issues 2-4 have been resolved in Agape's favor, Issue 1 is another matter entirely. Under Issue 1 the Commission wants to know if, in light of Agape's failure to commence operation with Station KNON for over five years, the applicant is qualified to remain a Commission licensee.

9. This issue must be decided adversely to Agape. The record shows that for well over six years, not five, Agape has disserved the public interest, and that it has no *bona fide* excuse for such disservice.

10. The Agape Broadcasting Foundation was formed in 1971 for the purpose of building and operating a noncommercial public radio station. It received a license to do so the same year. However, Agape had neither the funds nor the technical expertise to do so at that time. It took four years of planning and fund-raising before KCHU (KNON's predecessor) signed on the air in 1975. So at the outset Agape let the frequency lay fallow for four years. Such a delay is hardly commendable in an industry whose keystone is service to the public.

11. After going on the air in 1975, Agape operated the station for two years. During that period the station was principally funded and operated by Lorenzo Milam. However, in the Spring of 1977, Milam entered into a management agreement with ACORN. Under the agreement Milam was relieved of the various burdens associated with operating Agape's station, and ACORN was given the opportunity to try operating a radio station.

12. The agreement can hardly be described as a success. ACORN did nothing, and on or about September 16, 1977, the station went silent, its tower was repossessed, and ownership thereof was transferred to another party. In addition Collins Radio Corporation repossessed some of the broadcast equipment; Agape lost the right to occupy its former studios; and somebody gutted the remaining broadcast equipment located at the studios. In sum KCHU was silenced because of a financial disaster, and through neglect.

13. Although ACORN, through its affiliate AM/FM, made some half-hearted efforts to get Agape reorganized, nothing was accomplished. Agape lay dormant. Between May 30, 1980, and May 30, 1981, no Board meetings were held, and there hadn't even been a quorum on the Board for at least a year before that. In fact one of Agape's remaining Board members, Mark Newberger, advocated disbanding Agape and turning over the ownership of KNON's license to an organization called Dallas Media Access. [42] Stated another way, between September 1977 and May 30, 1981, Agape had neither the money nor the inclination to serve the broadcasting public.

14. Finally, in the early Summer of 1981, ACORN began taking a series of steps that would rehabilitate Agape and place *de facto* control of the Foundation in ACORN's hands. Even then the ACORN dominated KNON management showed no sense of urgency to return to the air. In fact it wasn't until July 29, 1983, that KNON was able to obtain the necessary funds and broadcasting equipment to resume operation. Even then it commenced operations with a transmitter that was falling apart. They operated with that substandard ITA transmitter from July 1983 to May 1985.

15. Thus the record clearly shows that over a fourteen year period (from 1971 to 1985), Agape only made use of its frequency four of those years, and two of those four years it employed a substandard transmitter. During the 10 years of silence it showed little, if any, inclination to serve the Dallas listening public. Thus the conclusion is inescapable that Agape is not qualified to remain a Commission licensee. Issue 1 is decided adversely to Agape. Consequently it is not eligible for comparative consideration with Criswell.

16. *Issue 5: The Real-Party-in-Interest Issue*. Even if Issue 1 were resolved favorably to Agape, it still would not be basically qualified to remain a Commission licensee. Agape has failed to reveal that the Association of Community Organizations for Reform Now (ACORN) is the real-party-in-interest to BRED-830401BV, and thus has misrepresented to and lacked candor with the Commission about its ownership structure. See Findings 49-106 *supra*.

17. In 1981 ACORN assumed *de facto* control over Agape, and has been in such control ever since. It did so by having local ACORN members become members of the Foundation, by placing ACORN members or ACORN sympathizers on Agape's Board of Directors, and by placing ACORN members or sympathizers in key KNON management positions. It physically moved Agape headquarters, and KNON's operations into its own building at 4415 San Jacinto. And it tied-up KNON's operations through agreements with its affiliates, AM/FM and CCI. The record is clear, ACORN controls KNON's operations.

18. So even if Agape were qualified under Issue 1, it would be disqualified under Issue 5. Thus it would still remain ineligible for comparative consideration.

19. *Issue 6: The Shared-Time Issue*. Issue 6 is moot. A shared-time arrangement assumes two or more basically qualified applicants. As previously noted (Conclusions 8-15 and 16-18 *supra*.) that condition doesn't exist here. Criswell is basically qualified, Agape isn't.

20. *Issues 7-8: The Comparative Issue*. It isn't necessary to make any comparative conclusions in this case.[43] Since only basically qualified applicants are entitled to comparative consideration, and since Agape is not basically qualified to be a Commission licensee, this leaves Criswell the only basically qualified applicant, and no comparison is needed. So Issues 7-8 are moot.

Issue 9: The Ultimate Issue

21. Pursuant to the evidence adduced under Issues 1-8, it is concluded that Criswell's application should be granted, and Agape's denied. Criswell is the only remaining basically qualified applicant for the frequency in question. Accordingly, the public interest would best be served by granting its application.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, Criswell Center for Biblical Studies' application (BPED-830630AF) IS GRANTED; and Agape Broadcasting Foundation, Inc.'s application (BRED-840301BV) IS DENIED.[44]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] John P. Crigler withdrew as Agape's counsel on June 11, 1986.

[2] The issues were enlarged on January 24, 1986 (FCC 86M-333). Thus it was necessary to hear this proceeding in two phases.

[3] In the interest of decisional organization the issues have been renumbered. In addition the contingent comparative issue has been reworded to remove any reference to 47 USC 307(b). 47 USC 307(b) became moot with the dismissal of the McKinney Educational Broadcasting Foundation for McKinney, Texas. See FCC 86M-269, released January 22, 1986. So original Issue 5 was mooted, and Issue 8 has been reworded.

[4] The word "apparently" has been used because Agape never established or even tried to establish precisely when KCHU-FM began and ceased operation. So paragraph 2 of the Hearing Designation Order is being used to show approximately when it went off the air.

[5] What with getting three stations on the air, and checking in at headquarters, Fox was "spread between places"; i.e., between Tampa, Florida; Little Rock, Arkansas; Dallas, Texas; and New Orleans, Louisiana (AM/FM's headquarters).

[6] These findings are made because Joseph Fox is the only knowledgeable witness that Agape presented on the "silence" issue, and he appeared to be in the dark about exactly what occurred before he arrived at the station.

[7] It is not clear whether Fox couldn't obtain any lease whatsoever, or whether he couldn't obtain a lease at a price he could afford to pay.

[8] On various occasions during 1978, Agape tried to raise funds. But these fund-raisers were all relatively small affairs. None of them were designed to raise the amount of funds KNON would need to get back on the air.

[9] Actually since Joseph Fox didn't affiliate with Agape until March 1978, his predecessor or someone before him should have notified the Commission KNON was off the air. They didn't.

[10] Agape asserts that it explored a low power operation because it was frustrated with the delay and uncertainty surrounding its April 30, 1979, 100 kW application. This assertion is rejected. The record clearly shows it was financial considerations that led Agape to change to a low power operation.

[11] The record is silent on whether any other stations in the Dallas area were silenced by such severe and unusual weathers conditions.

[12] The ITA transmitter was an older piece of equipment. It was sold to Agape by KNON's then engineer Charles Staples. When Agape agreed to buy the ITA from Staples, Staples agreed to provide engineering services free of charge. But the ITA transmitter wasn't an easy piece of equipment to maintain. ITA, the company that had made it, had gone out of business. Consequently Agape had difficulty in even obtaining parts.

[13] But see Findings 28-29 *supra*.

[14] At one point (Criswell Ex. 12 p. 19), Sartor tried to lay KNON's varied ills at Staples' feet. He said: "...KNON Community Radio uses a volunteer engineer, Charles Staples, who works full-time at another radio station. Being a volunteer, Mr.

Staples has limited time to service our needs. Once KNON's financial base is stronger ... KNON will have an engineer on payroll. Until :hen we must rely on Mr. Staples and use him when we can....

[15] Allen MacNeil "Mac" England worked at KNON from April or May 1984 until May 1985. Initially he was canvas director; later he became program director; he also acted as interim station manager for short periods.

[16] Of course when the station wasn't operating at full power (See Finding 29 *supra*.) the "Marti" meter could not be calibrated.

[17] The record is silent on whether ACORN exercised its ownership option. However, its subsequent conduct suggests that it did not.

[18] Ms. Campbell's list of "original" Board members doesn't coincide with the Board members listed in Artlcle IX of Agape Articles of Incorporation. Compare Criswell Ex. 2-20, page 51 with Agape Exhibit 13, page 103.

[19] It is not clear whether the "proposal" Ms. Campbell was referring to was an ACORN proposal to get KCHU back on the air.

[20] Agape itself describes the silent period this way (Criswell Ex. 2-61, p. 12): "After the frequency went dark in the Fall of 1977 there was a gradual turnover of the Board members and a change of call letters. ACORN, the Association of Community Organizations for Reform NOW, became very involved with the station at this time and eventually placed a number of it's (sic) members on the Agape Board. This helped shift the emphasis of the station to becoming a voice of the low and moderate income persons once the station returned to the air."

[21] Here's how Agape describes the AM/FM-ACORN relationship: "ACORN, through AM/FM, a non-profit management corporation involved in media projects in Tampa and Little Rock, had successfully established one community radio station and was working on developing KNON and KABF in Arkansas..."

[22] The AM/FM-Agape agreement was renewed on July 22, 1981. See Criswell Ex. 2-25, pp. 100-101.

[23] At :he time they entered into the agreement with Lorenzo Milam, ACORN contemplated moving its Texas office to the first floor of KCHU's studio (Criswell Ex. 2-20, p. 76).

[24] Here's the way Bachmann describes the AM/FM-Agape relationship at that point-in-time: "AM/FM has been caring for a corporation (Agape). Its formal contract ran out a while back, but AM/FM is a pro bono outfit, and its been hanging on, because from time to time there are flashes of light out there indicating that either the officers or members of Agape are going to come and get Agape moving again. AMFM is getting a bit tired but it hasn't withdrawn yet..."

[25] The record is silent as to whether Bobbye Mangram, and/or Robert Carvajal, the other two Board members were ACORN members. Bobbye Mangram certainly acted like one at times. See Findings 67 and 69 *supra*.

[26] It isn't clear whether AISJ is also an ACORN affiliate. However, AISJ was later to play a significant role in a proposed agreement between Agape and ACORN. See *infra*.

[27] Ruth Martin *now* claims that Sartor misrepresented the facts to CHD. She says that Sartor listed some Agape Board members as ACORN members when, in fact, they no longer were. In other words, Agape will either hold itself as an ACORN affiliate or not, depending on the circumstances.

[28] Sartor did, in fact, attend an ACORN staff meeting in New Orleans and Agape reimbursed him for the travel expenses. While he did not consider himself an ACORN staff member, *per se*, he considered himself a staff member of KNON "...which was affiliated with the ACORN movement." Tr. 2069-2071.

[29] Murray also has extensive ACORN background. See Tr. 2734-2736.

[30] This meeting was captioned "KNON PLANNING MEETING II." See Criswell Ex. 2-44. The Presiding Officer was forced to strike what he believes was "KNON PLANNING MEETING I" for the failure to authenticate. See Criswell Ex. 2-28, and Tr. 2810-2812.

[31] England came to KNON from an ACORN fund-raiser staff job. He had previously worked for organizations that later affiliated with ACORN. In 1984 he was transferred to Dallas to work at ACORN's canvas operation. When ACORN wanted to transfer him to Austin, he quit and became KNON's canvas director.

[32] In addition, ACORN has exercised its power under the agreement to the extent of naming Arquilla Smith to the Agape Board (Tr. 2721, 2726).

[33] ACORN, a non-tax exempt organization, conducts various activities through affiliated tax-exempt organizations. So it must be very careful not to assume *de jure* control of such affiliates or it will court problems with IRS. See e.g. Finding 53 *supra*.

[34] This is not to say that ACORN was the only group interested in KNON's frequency. The records shows that several organizations and persons wanted the station. But the ACORN dominated organization fought them off.

[35] Agape didn't present any biographical information on Board member James Miller, although the record does reflect that he has been an ACORN member, and has been on the Agape Board since 1981 (See Finding 65 *supra*.)

[36] The Lower Peach Branch seeks to improve those segments of the Dallas community that face utility service problems, flooding, or unsanitary city waste water.

[37] The Good News Club sponsors Bible classes for neighborhood children.

[38] The record doesn't reflect whether Ms. Simms lives within Agape's service area or not.

[39] There is apparently a vacancy on the Criswell Board since it only submitted biographical data on eleven people.

[40] "89 Sunshine Place" and "Amen Corner" were added after the "B" cut-off date in this proceeding.

[41] Staples probably believed that the ITA was operational. That was undoubtedly wishful thinking on his part. But it is understandable that since he thought that KNON was under a Commission imposed deadline to be back on the air by the end of July 1983, and since he had sold KNON a transmitter he thought would meet KNON's operating requirements, he deluded himself into believing that the ITA transmitter was indeed operable on that date.

[42] Technically Agape had forfeited its right to a station license and should have surrendered the station license. Had that been done other interested parties who had the finances and broadcast resources could have applied for the frequency.

[43] Note, however, that comparative findings have been made. See Findings 111-114 and 115-148 *supra*. So if an appellate body disagrees with any facet of this decision no remand will be required. Stated another way, findings of fact have been made on *all* the issues, and conclusions of law have been made on *all material* issues. See 47 CFR 1.267(b) and 5 USC 557(C)(A).

[44] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

BC Docket No. 82-763

In re Application of

ELBA DEVELOPMENT CORPORATION
(KQTV-TV) File No. BPCT-801114KG
St. Joseph, Missouri

For a Construction Permit for
a Major Change

Appearances

Michael D. Hays, Barbara S. Ianniello, and *Brian E. Keating,* on behalf of Elba Development Corporation; *Herbert D. Miller, Jr.* and *John Wells King,* on behalf of Taft Broadcasting Co. and Meredith Corp.; *J. Richard Carr,* on behalf of Scripps Howard Broadcasting Co. and The Hearst Corporation; and *Y. Paulette Laden* and *Charles E. Dziedzic,* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUPPLEMENTAL DECISION

Adopted: November 13, 1986 Released: November 21, 1986

By the Review Board: MARINO (Chairman), JACOBS, and BLUMENTHAL.

Board Member BLUMENTHAL:

1. This proceeding involves the application of Elba Development Corporation's (Elba) KQTV-TV for authority to modify its existing facilities by changing its transmitter site, increasing its antenna height above average terrain, and directionalizing the antenna of its Station KQTV-TV, Channel 2, St. Joseph, Missouri. In our *Decision,* 96 FCC 2d 376 (Rev. Bd. 1984), we denied the Elba application because its proposed transmitter site move would create a "white area" (an area without any Grade B television service) of 9,936 persons and this loss was not outweighed by Elba's proposed service gains or other alleged public interest factors. However, we also recognized therein that the Mass Media Bureau might shortly modify its policy in a significantly deregulatory vein to permit an applicant proposing a transmitter site move to show that its service loss area would receive adequate service from cable television, translators, and beyond-Grade B-viewing of other television stations, and we suggested that Elba's application "should be reevaluated under the tenets of any such policy revision." 96 FCC 2d at 391.

2. While agreeing that the Board had properly applied then-existing policy, the Commission did reverse its policy, and will now consider "whether the creation of white areas is mitigated by the availability of alternative video services such as cable and translator service or the viewing of stations beyond their Grade B contours." *KTVO, Inc. (KTVO-TV),* 57 RR 2d 648, 650 (1984). The Commission there explained that:

> "In recent years it has become apparent that for some purposes the public interest is best served by treating the various forms of alternative service as a single video marketplace. This holds true in the present situation where we must evaluate the service needs of populations on the fringe of a primary television station's service area. Residents of those fringe areas may well have decided that they do not wish to rely on the availability of a single relative weak Grade B signal. They may therefore have elected to subscribe to cable service or have procured equipment enabling them to receive signals from beyond a station's Grade B Contour. Similarly, under these circumstances, translators or low power television, although by nature secondary services, may represent the most realistic option for providing service to these areas. Where this is the case, there is no justification for including the recipients of such alternative service in calculating the extent of white areas."

Id. (footnote omitted).

3. Shortly after announcing its policy reversal, the Commission remanded the instant proceeding for further evidentiary hearing to determine in light of *KTVO-TV* whether the white area created by Elba's proposal will be eliminated or reduced to *de minimis* proportions by consideration of evidence of alternative video services. *Memorandum Opinion and Order,* FCC 84-657, released January 7, 1985. The Commission called for "a realistic assessment of the service needs of the predicted white area." *Id.,* at para. 5. Then, in dismissing a petition filed by Taft Broadcasting Company which sought vacation of the remand order and reinstatement of the Board *Decision* in this proceeding, the Commission offered the following further guidance as to its policy shift:

> "Our new policy reflects in part our conviction that the public interest is generally served by giving licensees discretion to locate their transmitters to meet the changing needs of their audiences. Nevertheless, we recognize that the loss of existing service cognizable under our Rules is contrary to the public interest. In view of these conflicting factors, we have defined a narrow area of concern: whether the apparent service losses represented by white areas, as indicated by pertinent field intensity contours, represent substantial losses in view of alternative video services available. We wish to emphasize that our intention here is to narrow administrative encroachment into the licensee's discretion, specifically with respect to facility modifications."

Memorandum Opinion and Order, FCC 85-254, released May 13, 1985.

4. In a *Supplemental Initial Decision,* FCC 86D-34, released May 9, 1986, presiding Chief Administrative Law Judge Thomas B. Fitzpatrick (ALJ) again denied the Elba application, because "4,940 persons would lose the KQTV Grade B service and would not have available to them alternative video services." *Id.,* Concls., at para. 11. In reaching his conclusion, the ALJ rejected as unreliable a

survey commissioned by Elba and performed under the direction of Professor Stephen Miller (Miller), Chairman of the Marketing Department in the College of Business Administration at Oklahoma State University. *Id.*, Concls., paras. 3-11. The Miller Study, which was composed of a personal interview survey of persons in the white area selected by a three-stage stratified cluster sampling method, id., Concls., para. 4, asserted that between 278 and 785 people would lose their only Grade B television service as a result of the proposed Elba site move. *Id.*, Fdgs., paras. 24-26. The respondents - Taft Broadcasting Company, Scripps-Howard Broadcasting Co., The Hearst Corporation, and Meredith Corporation - supported in part by the Mass Media Bureau, challenged the reliability of the Miller Study for several reasons, including the choice of the appropriate contour (64 dBu v. 74 dBu) used to depict Grade B-equivalent translator service, failure to estimate the sample precision and statistical confidence levels, alleged failure to use completely a probability sampling methodology, lack of written instructions to interviewers, choice of survey questions, absence of call back procedures, and failure to account properly for interviewee negative comments on television reception quality. *Id.*, Fdgs., paras. 28-104. Based on these criticisms, the ALJ found the Miller Study to be unreliable. *Id.*, Concls., paras. 5-10.

5. However, the respondents themselves commissioned a survey by Norman Hecht (Hecht), president and founder of Information and Analysis, Inc., which is now a subsidiary of AGB Research PLC, a large international market research and media research firm. The Hecht Study was exchanged as an intended hearing exhibit, but was apparently withdrawn when the respondents determined that it was unneeded to rebut adequately the Miller Study introduced into evidence by Elba. *See* Elba Br. at 10-14; Taft Reply at 20-24. The Hecht Study apparently suffered from some of the same imperfections found in the Miller Study. Tr. 1736-1737. Elba sought to introduce the Hecht Study into evidence - apparently in order to show that the alleged defects in the Miller Study were not substantial - but the ALJ refused its admission. Tr. 1735; *Memorandum Opinion and Order*, FCC 85M-3879, released October 4, 1985. The Hecht Study concluded, *inter alia*, that 1468 (28.2%) of the 5,206 white area residents who are not cable subscribers receive only KQTV-TV and that 2,759 persons (53%) rely on KQTV-TV as their only source of an alternative national network service. Taft Reply at 21.

6. In situations where engineering-type measurements are needed to decide a case and the parties have submitted conflicting data, the Board has full plenary authority pursuant to Section 0.365(a) of the Rules, 47 CFR 0.365(a), to direct that joint measurements be taken in order to ensure that a full record is secured prior to final decision. *See GSM Media Corporation*, 93 FCC 2d 1271 (Rev. Bd. 1983) (MO&O), and *Decision*, 94 FCC 2d 1168, 1172, n. 4 (Rev. Bd. 1983) (and cases cited therein), *aff'd*, FCC 84-550, released November 23, 1984 (Comm'n), *modified*, 101 FCC 2d 657 (1985). In the instant case, the Board has carefully considered requiring the parties to conduct a joint study of the white area that would be created by the proposed KQTV-TV transmitter site move, but has also noted the apparent agreement expressed by the parties in their pleadings that the respondents' Hecht Study could serve as a "worst-case" delimiter. *See* Elba Br. at 49 ("in the worst-case, 1468 people would lose television service if KQTV relocated its tower"); Taft Reply at 21. At oral argument before the Board, held October 3, 1986, counsel for the parties stipulated that the Hecht Study was valid to demonstrate that no more than 1468 persons in non-cable households within the white area would lose their only Grade B television service. Tr. of Oral Arg. at 1894-1895, 1980, 1991-1992 (Elba counsel); 1926, 1929 (Taft and Meredith counsel); 1940 (Scripps-Howard and Hearst counsel). In other words, this aspect of the Hecht Study may be considered as serving as the functional equivalent of a "joint study" of the "worst-case" scenario. Moreover, counsel for Elba accurately pointed out that the 1468 loss figure does not account for any compensating television service from translators, and that when using assumptions most favorable to the respondents *(i.e.*, only 74 dBu translator service area may be used and this area covers territory that is 90% penetrated by cable), 407 persons out of the 1468 will receive 74 dBu translator service. Tr. of Oral Arg. at 1992 (*citing* Taft Opposition to Motion for Summary Decision, filed August 14, 1985, at 6). Therefore, by operation of stipulation of counsel, we believe it is fair for our purposes to assume that the white area created by the proposed Elba transmitter site move will include no more than 1061 persons who will not receive alternative video services.

7. The Commission has previously held in granting a proposed transmitter site move that a white area loss sector containing approximately 500 people is *de minimis*. *WSET, Incorporated (WSET-TV)*, 80 FCC 2d 233, 246 (1980). By contrast, it has declared in the *KTVO-TV* remand order, *supra*, that a white area containing 5,022 persons is not *de minimis*. *See* 57 RR 2d at 650. We do not know with certainty whether or not the "worst-case" white area loss sector in the instant case, containing 1,061 persons, would be regarded by the Commission as *de minimis*. For example, we do not know whether the *de minimis* factor is static at 500 persons in every case; whether that factor varies in proportion to the service area or loss (or gain) areas; or whether network service takes on any special significance. *See Central Alabama Broadcasters, Inc.*, 88 FCC 2d 1501, 1531, 1534 (Rev. Bd. 1982) (substantial network service gains counted in favor of transmitter relocation applicant), *recon. denied*, 89 FCC 2d 1029 (Rev. Bd. 1982), *rev. denied*, FCC 83-210, released May 2, 1983 (Comm'n), *aff'd without opinion sub nom. Montgomery Independent Telecasters, Inc. v. FCC*, No. 83-1557 (D.C. Cir. March 1, 1984). The Mass Media Bureau urges that the 500 figure (approximately) definitively demarcates *de minimis*, pursuant to *WSET-TV*, *supra*, and that, therefore, Elba has not met its burden of proving that the projected white area loss would be *de minimis*.

8. Elba's essential problem is that the attainment of accuracy in affirmatively proving that not more than 500 persons out of approximately 10,000 in the entire white area would remain unserved by alternative video services requires a statistical study with very little, if any, margin for error. Although we find fewer defects in Elba's Miller Study than respondents contend, several prominent flaws prevent it from achieving the very highest level of reliability necessary to amount to substantial evidence, in the legal sense. For example, the third stage of the Miller Study did not involve a true random sampling of homes within a cluster. Instead, the interviewers "were to go to the area, interview the first house that, in their judgment, was at the spot marked on the map, and they were to interview contiguous households until the specified num-

ber of interviews had been completed." *I.D.*, Fdgs., at para. 20. Miller's failure to justify how this sampling method would produce valid results is, in a statistical sense, an obvious flaw. *Id.*, Fdgs., paras. 35-40, Concls., para. 9. Second, while we have no basic objection to Miller's use of the term "acceptable" in questioning white area viewers as to alternative reception, we are concerned that one of the four interviewers (representing about 25% of the total interviews) attached the following notation to her batch of completed questionnaires:

> "Overall the general response I received when I told the people that I was involved in a television reception survey, was that their reception was 'lousy'."

Id., Fdgs., para. 73. In addition, for 17% of the 187 television homes surveyed by all interviewers, there were recorded on the questionnaires next to various channels listed as "acceptable" such comments as "depends on the weather," "unusually poor quality," "occasionally," "very poor," "not real good," "fuzzy," "varies," *etc. Id.*, para. 70 and n.43. These ambiguities might have been avoided by a survey question that defined "acceptable" in a manner more closely keyed to the Grade B standard set out in *Television Assignments*, 41 FCC 148, 177 (1952) ("Grades of Service") (Grade B Service means "a quality acceptable to the median observer is expected to be available for at least 90 per cent of the time"). In any event, we do not believe the Commission intended that those losing KQTV-TV be satisfied with alternative service described by at least 25% of those surveyed as "lousy." Third, Miller's failure to establish a sampling precision and statistical confidence levels for his survey is a critical flaw; almost all statisticians would consider the recitation of these fundamental delimiters as the *sine qua non* of obtaining a meaningful result. *See* H. ARKIN, HANDBOOK OF SAMPLING FOR AUDITING AND ACCOUNTING (2nd ed. 1974), at 77-82. It is true that the Commission had left the matter of appropriate survey standards rather open-ended, FCC 85-254, *supra*, at para. 6, perhaps because it did not fully realize just how uncertain the parties would be without more precise guidance. Undoubtedly, this issue will be subject to further Commission review, at which time it may wish to address several subsidiary policy questions which may well fall beyond the authority of the Board to address in the first instance. For example, how rigorous is the applicable standard in allowing leeway for white area losses? Are there other public interest factors - such as deference to licensee discretion to improve broadcast facilities - that should be weighed against the public interest in preventing the creation of white areas? How about white areas gains? Should the loss of network service (or a second or third network service) be counted against the applicant? Is there a public interest in assuring cable subscribers the availability of at least one off-the-air broadcast alternative? Also, the Commission may wish to consider requiring relevant parties to perform a joint study of the white area loss sector. As pointed out earlier, the Board considered doing so, but in the light of the uncertainties concerning what standards to apply in resolving this case, we resolved that the wiser course is to decide this case so that the Commission can earlier have the opportunity to review these matters if it so chooses.

9. As to that case at bar, the Commission here called for a determination as to whether, alternative video services considered, Elba's residual white area would be *de mininis*. *See supra* para. 3. That is the operative question here. And, for lack of any alternative benchmark whatever, we will honor for the present the Mass Media Bureau's contention that the level of approximately 500 persons accepted by the Commission in *WSET-TV*, *supra*, is its current appreciation of the term *de minimis* in this service loss context. Because of the infirmities in Elba's study, it has not shown by a preponderance of the record evidence that its loss of service white area, alternatives considered, will fall below the 500-person level. On the other hand, the hearing evidence does permit us to report that all parties, by stipulation, accept a "worst-case" loss area of 1061 (*see supra* para. 6). Whether the difference between 500 and 1061 loss area residents is decisional or, from an overall public interest standpoint, meaningful is not for us to say without further word from the Commission on its *de minimis* standard.

10. ACCORDINGLY, IT IS ORDERED, That the Uncontested Motion to Accept Misfiled Pleading filed July 10, 1986 by Elba Development Corporation IS GRANTED, and the Reply Brief IS ACCEPTED;

11. IT IS FURTHER ORDERED, That the joint Motion to Strike filed July 11, 1986 by the respondents IS DENIED; and

12. IT IS FURTHER ORDERED, That the application of Elba Development Corporation (KQTV-TV) (File No. BPCT-801114KG) for authority to modify its existing facilities at St. Joseph, Missouri IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-431

Amendment of Section 73.202(b),
Table of Allotments, RM-5417
FM Broadcast Stations.
(Albert Lea, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 20, 1986 Released: November 21, 1986

By the Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Albert Lea Communications ("petitioner"), seeking the allocation of FM Channel 241A to Albert Lea, Minnesota, as that community's second FM broadcast service. Petitioner provided an engineering study in support of the petition and indicated it would apply for the channel.

2. We believe the petitioner's proposal warrants consideration. Channel 241A can be allocated to Albert Lea, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules.

3. In view of the fact that the proposed allocation could provide a second FM broadcast service to Albert Lea, Minnesota, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission Rules, with respect to the following community:

	Channel No.	
Community	Present	Proposed
Albert Lea, Minnesota	237A	237A, 241A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE. A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allocated.

5. Interested parties may file comments on or before January 12, 1987, and reply comments on or before January 27, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Harry G. Sells
Sells and Gregory
10401 Georgetown Pike
Great Falls, Virginia 22066
(counsel to the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Table of FM Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 48 Fed. Reg. 11549, published February 9, 1981.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel assignments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioners constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles G. Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial com-

ments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments. pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-433

Amendment of Section 73.202(b),
Table of Allotments, RM-5477
FM Broadcast Stations.
(Hormigueros, Puerto Rico)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1986 Released: November 21, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for reconsideration filed by Occidental Broadcasting Corporation ("petitioner") requesting the allocation of Channel 291A to Hormigueros, Puerto Rico, as the community's second local FM service.[1] Channel 291A can be allocated to Hormigueros in compliance with the Commission mileage separation requirements with a site restriction of 16.6 kilometers south to avoid a short-spacing to Station WRFE, Channel 288A, Aguada, Puerto Rico, and to Station WNIK-FM, Channel 293, Arecibo, Puerto Rico. Petitioner provided a study showing that a Channel 291A allotment at Hormigueros with facilities of 3 kW and an effective antenna height of 1,100 feet with provide a 70 dBu signal over the entire community. It states that it will apply for the channel, if allocated.

2. Based upon petitioner's city grade coverage showing we believe the public interest would be served by soliciting comments on the proposal since it could provide Hormigueros with its second local FM service. Accordingly we propose to amend the FM Table of Allotments, Section 73.2O2(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Hormigueros, Puerto Rico	221A	221A, 291A

3. The Commission's authority to institute rule making proceedings showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before January 12, 1987, and reply comments on or before January 27, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John L. Tierney, Esq.
Ann Bavender, Esq.
Tierney & Swift
1020-19th Street, N.W., Suite 200
Washington, DC 20036
(Counsel to petitoner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 6O3 and 6O4 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections* 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments. reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection. of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTES

[1] The petition was orignally returned as being unacceptable due to short-spacings to Stations WRFE at Aguada, and WNIK-FM at Arecibo, Puerto Rico. Such short spacings caused the transmitter site to be restricted at a distance which would normally make city grade coverage unlikely. However, Section 73.211 of the Commission's Rules permits additional antenna height in Puerto Rico making city grade coverage feasible with an appropriate showing.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-434

Amendment of Section 73.202(b),
Table of Allotments, RM-5573
FM Broadcast Stations.
(Pago Pago, American Samoa)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1986 Released: November 21, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed on behalf of Samoa Technologies, Inc. ("petitioner") requesting the allocation of Channel 221A to Pago Pago, American Samoa, as the community's first local FM service. Petitioner states that it will apply for the channel, if allocated. Channel 221A can be allocated in compliance with the Commission's minimum distance separation and other technical requirements without the imposition of a site restriction.

2. We believe the public interest would be served by proposing the allocation of Channel 221A to Pago Pago since it could provide the community with its first local FM service. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Pago Pago, American Samoa	—	221A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before January 12 ,1987, and reply comments on or before January 27,1987, and are advised to read the Appendix for the proper procedures. Addittonally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Ray D. Thrower, P.E.
Thrower & Associates, Inc.
P.0. Box 12725
Salem, Oregon 97309
(Consultant to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making* to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not ben served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial com-

ments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments. reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-435

Amendment of Section 73.202(b),
Table of Allotments, RM-5516
FM Broadcast Stations.
(Morehead City, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1986 Released: November 21, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it the request of Curtis Radio Group, Inc. ("petitioner") to substitute Channel 242C2 for Channel 240A at Morehead City, North Carolina, and to modify its license for Station WRHT(FM) to specify operation on the higher powered channel.[1] Petitioner states that it will apply for and construct the facilities necessary to implement the improvement in Station WRHT's service, if the substitution of channels is adopted.

2. Channel 242C2 can be allocated in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. However, the channel cannot be used at Station WRHT(FM)'s current transmitter location due to a .9 kilometer short-spacing to Station WYLT, Channel 241 at Raleigh, North Carolina.

3. In accordance with our established policy, we shall propose to modify the license of Station WRHT(FM) to specify operation on Channel 242C2. Pursuant to the Commission's Rules, modification of the license may be implemented without demonstrating the availability of an additional equivalent channel for use by other interested parties. See *Report and Order*, MM Docket 85-313, 51 FR 20290, June 4, 1986.

4. Accordingly, in order to provide Morehead City with its first wide coverage FM station, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Rules, with regard to the community listed below, to read as follows:

City	Channel No. Present	Proposed
Morehead City, North Carolina	240A	242C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before January 12, 1987, and reply comments on or before January 27,1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Mark J. Prak, Esq.
Tharrington, Smith & Hargrove
P.O. Box 1151
Raleigh, North Carolina 27602
(Counsel to Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections* 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the

channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTES

[1] Channel 240A is allocated to Morehead-Beaufort in the Table of Allotments but licensed to Station WRHT(FM) at Morehead City. Therefore, we shall propose to amend the Table to reflect the use of Channel 240A at Morehead City.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-436

Amendment of Section 73.202(b),
Table of Allotments, RM-5493
FM Broadcast Stations.
(Defiance, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1986 Released: November 21, 1986

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the petition for rule making submitted by Gary Wilson ("petitioner") requesting the allocation of Channel 290A to Defiance, Ohio, as the community's second local FM service.

2. Channel 290A can be allocated to Defiance in compliance with the Commission's minimum distance separation and other technical requirements without the imposition of a site restriction. However, since the community is located within 320 kilometers (200 miles) of the U.S., Canada border, concurrence by the Canadian Government must be obtained.

3. We believe the public interest would be served by seeking comments on the proposed allocation since it could provide Defiance with its second local FM service. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Defiance, Ohio	251	251, 290A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. NOTE: A showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before January 12, 1987, and reply comments on or before January 27, 1987, and are advised to read the Appendix for the proper procedures. Additionally, a copy of each comment should be served on the petitioners, or their counsel or consultant as follows:

Gary D. Wilson
7510 Dorr Street, #196
Toledo, Ohio 43617

6. The Commission has determined that the relevant provisions of the Regulatory Flexibilty Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See, *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b)* of the Commission's Rules, 46 Fed. Reg. 11549, published February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the prooeeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Charles Schott
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial com-

ments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and reply Comments Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments. or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. .(See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

INDEX

	Page
000.283 Authority delegated	592
000.365(a) Authority Delegated - Review Board	773
001.106 Petition for Reconsideration	600
001.115 APP for Rev of Action Taken Pursuant to Delegated Au	593
001.115 Appl. for rev. of action taken purs't to deleg'd aut	634
001.115 Application for Review	589
001.115 Application for Review of Action Taken Pursuant to D	594
001.46 Motions for extension of time	664
001.713 Satisfaction of Complaints; damages	736
001.748 Dismissal of Applications	600
001.765 Construction, Extension, Acquisition or operation of	600
001.773 Petitions for suspension or rejection of new tariff	670
001.80 Forfeiture Proceedings	729
002.106 Table of Frequency Allocations	549
018.121 Exemptions	553
021.15 Site Availability	746
021.17 Financial Qualification	746
021.32 Consideration of Applications.	745
021.902 Frequency Interference	746
022.13 General application requirements	605
022.501 Frequencies	601
022.909 Control Point	749
022.909 Control Point	751
022.913 Content and form of applications	564
022.913 Content and form of applications	739
022.917 Demonstration of financial qualifications	605
022.917(b)(1)(i) Financial qualifications	607
022.918 Amendment of cellular applications	739
022.918(b) Amendment of cellular applications	752
025.209 Antenna Performance Standards	665
025.391 Qualifications of Dom. Sat. Space Station Licensees	682
047 CFR 73.3525(b)	637
047 CFR 73.3526	637
061 Tariffs	728
063.01 Contents of Applications	576
063.01 Contents of Applications	577
063.01 Contents of Applications	578
063.01 Contents of Applications	579
063.01 Contents of Applications	583
063.01 Contents of Applications	584
063.01 Contents of Applications	723
063.01 Contents of Applications	738
063.01 Contents of Applications	749
063.01 Contents of Applications	750
063.01 Contents of applications	634
064.702 Furnishing of Enhanced Services CPE	662
066.et al Applications relating to Acquisition of Tele. Co.	600
067 Jurisdictional Separations Procedures	726
067-Equal Access and Network Reconfiguration	615
069 Access Charges	726

069 Access Charges 728
069.205 Transitional premium charges 634
073.1030 interference to radio astronomy 732
073.202(b) Table of Allotments 717
073.202, Table of Allotements 680
073.202, Table of Allotments 672
073.202, Table of Allotments 674
073.202, Table of Allotments 678
073.202, Table of Allotments 716
073.202, Table of Allotments 776
073.202, Table of Allotments 778
073.202, Table of Allotments 780
073.202, Table of Allotments 782
073.202, Table of Allotments 784
073.3500 Application and Report Forms 567
073.3525 Agreements for Removing Applications Conflicts 753
073.606, Table of Allotments 676
073.606, Table of Assignments 719
073.685 Transmitter Location 773
080.1061 Special Requirements for EPIRB stations operating o 549
080.15 Eligibility for station license 549
300.152 Application of Act (Preemption) 555
300.152 Application of Act (Preemption) 561
300.201 Service and Charges 736
300.202 Discrimination and Preferences 736
300.202 Petition for refunds, rate discrimination 618
300.207 Complaint foı damages 618
300.208 Complaints to the Commission 572
300.208 Complaints to the Commission 736
300.214 Ext. of Lines 749
300.214 Ext. of Lines 750
300.214 Extension of Lines 576
300.214 Extension of Lines 577
300.214 Extension of Lines 578
300.214 Extension of Lines 579
300.214 Extension of Lines 580
300.214 Extension of Lines 583
300.214 Extension of Lines 584
300.214 Extension of Lines 721
300.214 Extension of Lines 723
300.214 Extension of Lines 738
300.222 Competition among record carriers 670
300.301 License for Radio Communication or Trans. of Energy 729
300.301-399B Provisions Relating to Radio 580
300.309 Action Upon Appl., Form of Conditions Attached to Li 667
300.309 Action Upon Appl., Form of Conditions Attached to Li 723
300.309 Action Upon Appl., form of Conditions Attached to Li 603
300.309 Petition to Deny 746
300.310 Limitation on Holding and Transfer of Licenses 721
300.315 Facilities for Candidates for Public Office 589
300.319 Construction Permits 603
300.319 Construction Permits 667
300.319 Construction Permits 723
400.05706 Review, remand for further proceedings 618

400.201 Implementation of Policy 580
400.34-39 Cable Landing License Act 742
400.47721 Implementation of Policy 721
500.080 - Renewal Expectancy 691
500.110 Minimum Separations 732
500.112 Air Harzard 608
500.112 Air Hazard 609
500.112 Air Hazard 730
500.112 Air Hazard 732
500.116 Site availability 732
500.120 Multiple ownership 732
500.124 Satellite 730
500.125 - Misrepresentation 691
500.1260 HDO (Abbeville Educ.) (Abbeville, LA) 586
500.1260 HDO (Robert G. Payne) (Ft. Mitchell, AL) 595
500.128 Misrepresentation 732
500.140 Comparative 608
500.140 Comparative 609
500.140 Comparative 730
500.140 Comparative 732
500.140 Comparative 735
500.150 Ulimate 608
500.150 Ultimate 609
500.150 Ultimate 730
500.150 Ultimate 732
500.150 Ultimate 735
500.2065 Comparative Coverage 637
500.2090 noncommercial educational 758
500.2120 licensee responsibility 758
500.2125 Misrepresentation 637
500.2135 real-party-in-interest 758
500.2180 Site Availability or Suitability 637
500.3085 307(b), Distribution of Broadcast Facilities 773
500.3095 Character Qualifications 753
HDO (Jesus is Lord) (Cashtown, PA) 573
Section 022.33 Grants by random selection 588
Section 022.6 Filing of applications, fees, and numbers of c 588
Section 022.921 Ownership in applications for cellular servi 588
Section 022.922 Transfers and assignments of applications, p 588

U.S. GOVERNMENT PRINTING OFFICE:1986-181-195/60003

3000